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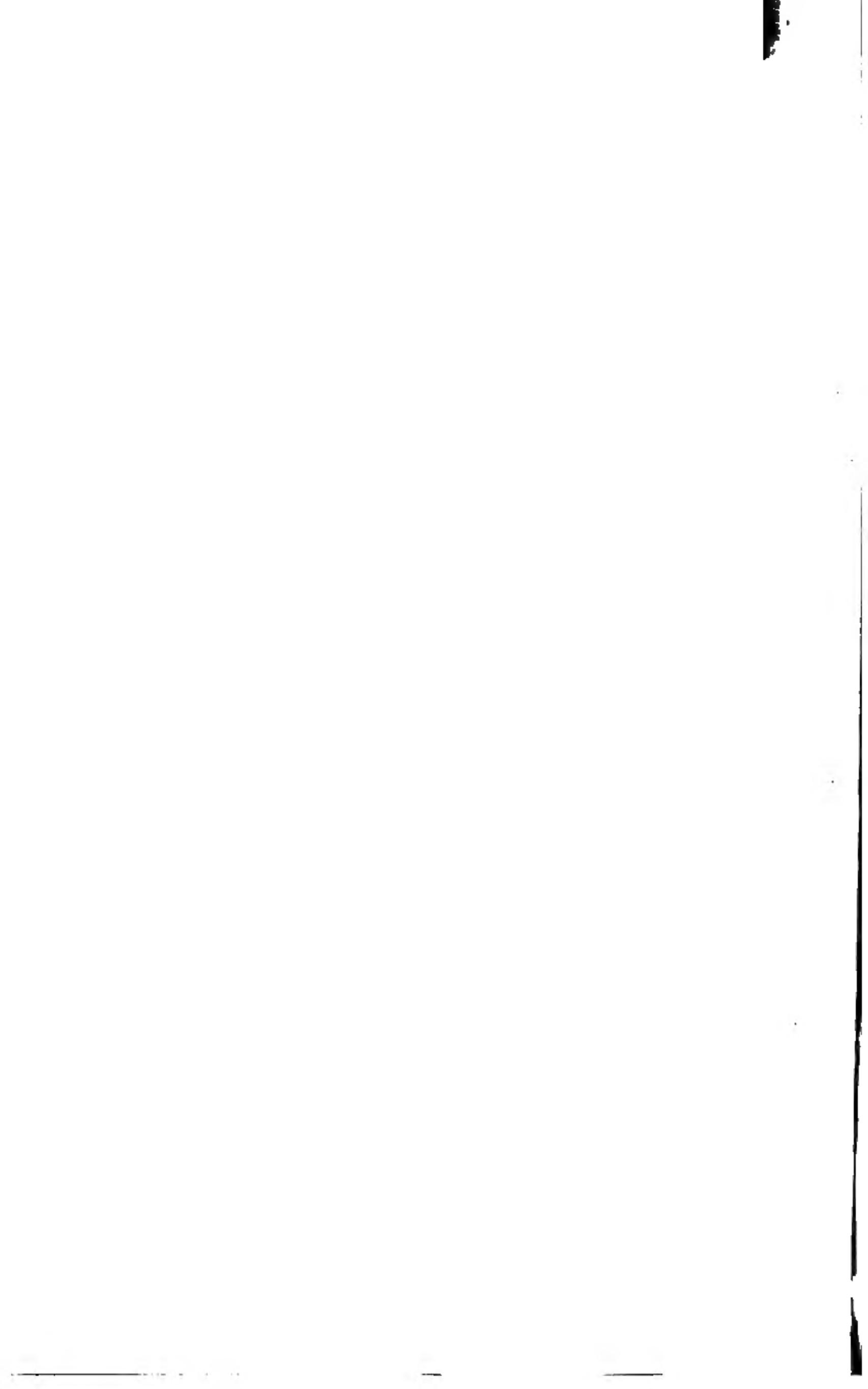
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THE
HOUSE OF LORDS CASES

ON

APPEALS AND WRITS OF ERROR,
AND CLAIMS OF PEERAGE,

DURING THE SESSIONS

1852, 1853, AND 1854.

BY CHARLES CLARK, Esq.,
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

BY APPOINTMENT OF THE HOUSE OF LORDS.

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DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS
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¹ The dates at which these changes took place have already been given, ante,
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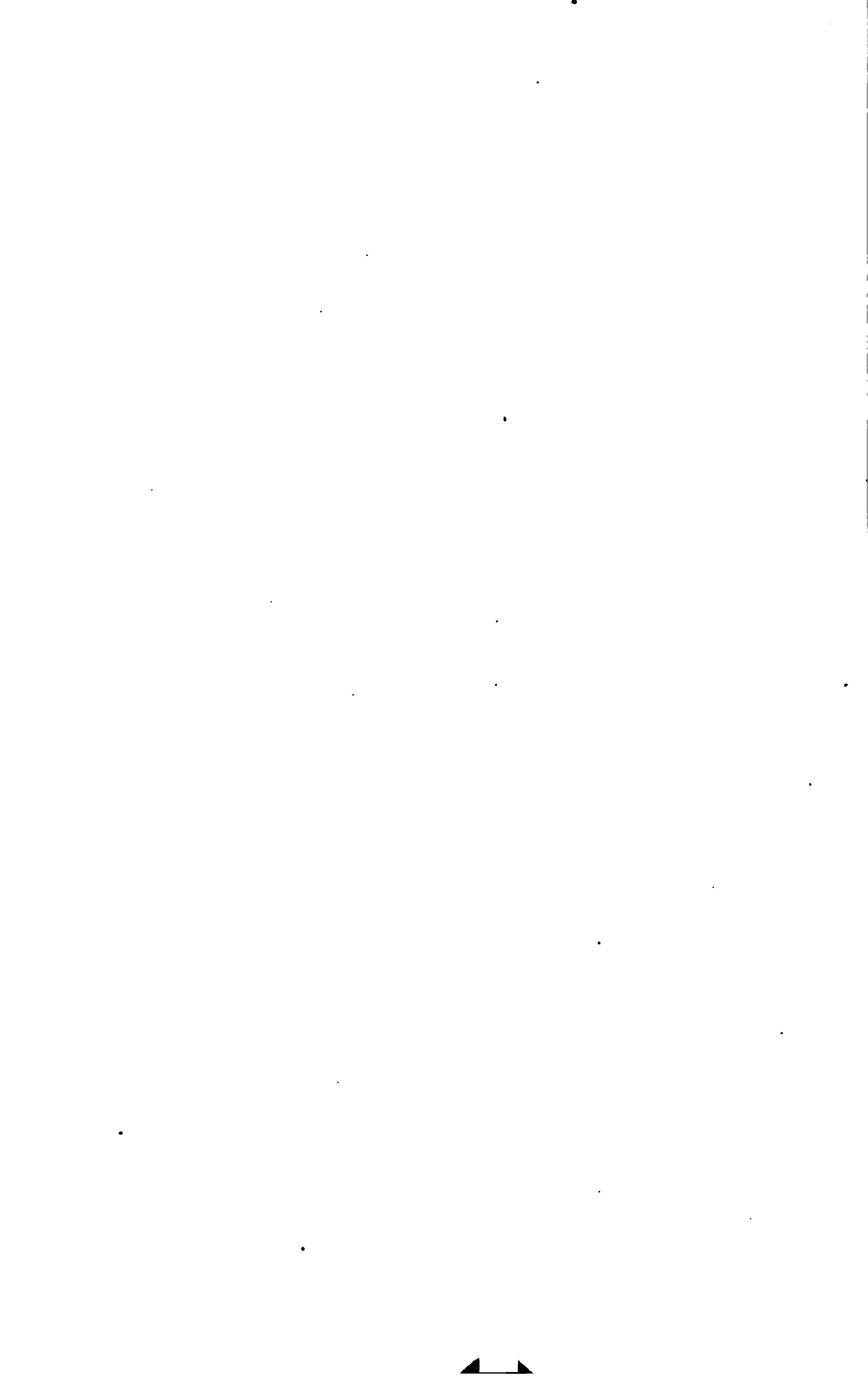
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CASES
IN THE
HOUSE OF LORDS.

EGERTON v. EARL BROWNLOW.

1853. June 23, 24, 27, 28, 30; August 1, 12, 19.

JOHN WILLIAM SPENCER BROWNLOW EGERTON, an } Appellant.
infant, by his next friend, }

AND

EARL BROWNLOW, THE HONOURABLE CHARLES }
HENRY EGERTON, WILBRAHAM EGERTON, W. } Respondents.
TATTON EGERTON, and others, }

*Contingent and Vested Interests. Condition precedent or subsequent.
Public Policy. Peerage. Practice.*

A contingent gift or interest has a real existence, capable, as much as a vested interest or estate, of being operated upon by a condition subsequent, and being made to cease and become void.

The Earl of Bridgewater by his will devised very large real estates to trustees to make a settlement according to the limitations mentioned in the will. One of these limitations was "to Lord Alford for and during the term of ninety-nine years, if he shall so long live"; remainder to trustees during his life to preserve contingent remainders; "remainder to the use of the heirs male of his body, with remainder, in default of such issue, to the use of C. H. C. for the term of ninety-nine years, if he shall so long live"; remainder to trustees to preserve contingent remainders; "remainder to the use of the heirs male of the body of C. H. C., subject, nevertheless, as to the several uses and estates so to be limited to Lord Alford and C. H. C., and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several provisos for the determination thereof hereinafter contained."

The testator then declared "that in the * settlement to be made pursuant *



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The testator then declared "that in the * settlement to be made pursuant * 2

to this my will, my said estates are not to be limited successively to the use of the first and other sons of Lord Alford or of C. H. C., in tail male, but to the heirs male of their respective bodies, in the words of this my will, it being my intention that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of the said Lord Alford and C. H. C. respectively." The testator then provided, "that if Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater to him and the heirs male of his body, then, and in such case, the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void." There was a similar proviso as to Lord Alford acquiring such title within five years after he should succeed to be Earl Brownlow, and unless he did so, the testator directed that the estate limited, &c. (as before) "shall thenceforth cease and be absolutely void; and my real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if the said Lord Alford were actually dead without issue male." Lord Alford entered into possession of the estates, but died without acquiring either of the titles, leaving an heir male.

Held, that the estate thus created in favour of Lord Alford's heirs male was not affected by the proviso, which was a condition subsequent, and which was void, as being against public policy, and therefore, that the eldest son of Lord Alford was entitled to the estates as heir male under the limitation.¹

Quære. Whether a subject can refuse a peerage, created either by patent or by writ. p. 37.

The Judges were summoned to answer questions of law: they differed in opinion on these questions. Most of the Judges being on circuit, two of their number attended on a day fixed by the House for receiving the answers, and proposed to read answers which embodied their own opinions and those of their brethren. The House adjourned the matter till the majority of the Judges should have returned from the circuit, so as to be able to attend in person, and individually express their reasons for their opinions. It was intimated that this permission to dispense with the attendance of any of the Judges to whom questions had been put, and who differed in their answers, must not be drawn into a precedent.

* 3 * JOHN WILLIAM, the seventh Earl of Bridgewater, deceased, was, at the time of his death, possessed of very large real estates in several counties in England, and also of personal estate of great value. On the 31st of March, 1823, he made a will duly executed and attested as by law was then required for the devise of freehold estates. By this will he gave to his wife, during the term of her natural life, the clear yearly sum of 12,000*l.*

¹ See Scott v. Avery, 5 H. L. Cas. 811, 852; Clavering v. Ellison, 7 H. L. Cas. 707, 715; Williams v. Bayley, Law Rep. 1 H. L. 207.

of lawful money of Great Britain, to be charged upon certain estates in Salop and Chester, and likewise an annuity of 4000*l.* to the Right Honourable Sir Charles Long, and to his wife Lady Long (the testator's niece), for their respective lives, charged upon the same estates; and subject to these charges he devised all his estates, whatsoever and wheresoever, "unto and to the use of the Right Honourable John Earl Brownlow, the Right Honourable Edward Herbert Lord Viscount Clive, and the said Sir Charles Long, their heirs and assigns for ever, upon trust, by such conveyances or assurances as shall be deemed expedient, or counsel shall advise, to convey and assure, settle and limit all my said hereditaments and real estates hereinbefore devised, with their appurtenances, to the several uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisos, limitations, and declarations hereinafter by this my will declared and directed concerning the same; and in the mean time to permit and suffer my said hereditaments and real estates to be held and enjoyed by, or to pay, apply, and dispose of the rents, issues, and profits thereof, unto or for the benefit of such person or persons, or for such intents and purposes as the same would go or belong to or be applicable if such settlement had been actually made pursuant to this my will: And I will and direct that such conveyance and settlement shall be to the use of the heirs of my body; remainder to the use * of the trustees," &c. *4 There were then certain limitations in favour of his brother's son in tail male, which never took effect, remainder to the use of his wife for life, without impeachment of waste, and from and after her decease, "to the use of the said Dame Amelia Long for the term of ninety-nine years, if she shall so long live: remainder to the said John Earl Brownlow and Edward Herbert Lord Viscount Clive, and their heirs, during her life, in trust to preserve contingent remainders: remainder to the use of the heirs male of the body of the said Dame Amelia Long: remainder to the use of the Right Honourable John Hume Cust, commonly called Lord Viscount Alford, the eldest son of the said John Earl Brownlow by my niece Sophia Lady Brownlow, his late wife, deceased, for and during the term of ninety-nine years computed as aforesaid, if the said John Hume Lord Viscount Alford shall so long live: remainder to the use of the said Edward Herbert Lord Viscount Clive and Sir Charles Long, and their heirs, during the life of the

said John Hume Lord Viscount Alford, in trust to preserve contingent remainders : remainder to the use of the heirs male of his body : with remainder, in default of such issue, to the use of the Honourable Charles Henry Cust, second and only younger son of the said John Earl Brownlow by the said Sophia Lady Brownlow his late wife, for the term of ninety-nine years, computed as aforesaid, if he the said Charles Henry Cust shall so long live : remainder to the use of the said Edward Herbert Lord Viscount Clive and Sir Charles Long, and their heirs, during the life of the said Charles Henry Cust, upon trust to preserve contingent remainders: remainder to the use of the heirs male of the body of the said Charles Henry Cust: subject, nevertheless, as to the several uses and estates so to be limited, to the said John Hume Lord Viscount Alford, and Charles Henry Cust, and to the trustees during their respective lives, and to the

* 5 * heirs male of their respective bodies, to the several provisos

for the determination thereof hereinafter contained." Then followed remainders to Wilbraham Egerton, of Tatton, Esq., for life ; then to trustees to preserve, &c. ; then to William Tatton Egerton, eldest son of the said Wilbraham Egerton ; then to trustees to preserve ; then to the first and other sons of the said William Tatton Egerton, " severally and successively according to seniority, and the heirs male of their respective bodies, every elder son and his issue male to be preferred to the younger son and his issue male." There were similar remainders to all the sons of the said Wilbraham Egerton, and remainders to other persons, after which the will proceeded thus : " With remainder to the use of my own right heirs for ever. And I declare, that in the settlement to be made pursuant to this my will, my said estates are not to be limited successively to the use of the first and other sons of my said brother, or of the said Dame Amelia Long, or of the said Lord Viscount Alford, or of the said Charles Henry Cust, in tail male, but to the heirs male of their respective bodies, in the words of this my will ; it being my intention that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of my said brother, the said Dame Amelia Long, the said Lord Viscount Alford, and the said Charles Henry Cust, respectively. Provided, and I declare my will to be, that every person who shall be entitled under the uses and limitations of this my will, or any settlement pursuant thereto, to the beneficial en-

joyment of my said estates, or any part thereof, for any term of years determinable on his death, or as tenant for life in possession, or as tenant in tail in possession, shall take and assume, or shall retain, as the case may require, the surname and arms of Egerton only, and shall at all times thereafter continue to use and bear such surname and arms, and no others ; and that in case any such person not then having * such surname and arms shall * 6 neglect or refuse to assume and take the same for six calendar months after he shall become so entitled in possession, or having then or having within the time so limited assumed and taken such surname and arms, shall afterwards discontinue to use and bear the same, or assume or use any other surname, or bear any other arms than the name and arms of Egerton, then, and in every such case, the use and estate directed to be limited to every such person so refusing, neglecting, or discontinuing to use the name and arms of Egerton only, who shall take for a term of years determinable on his death, or for his life, and also the use or estate directed to be limited to trustees and their heirs during his or her life, for preserving contingent remainders and the trusts thereof, and also the use or estate directed to be limited to the heirs male of his body, or all such of the uses or estates directed to be limited to the sons of any such person in tail male, as for the time being shall be in contingency or suspense, as the case may happen, shall thereupon cease, determine, and be void ; or if the person so refusing, neglecting, or discontinuing to use the name and arms of Egerton only, shall be tenant in tail, whether by purchase or descent, under or according to the uses or limitations declared or directed by this my will, then the estate tail limited to or vested by descent in him shall absolutely determine and be void ; and that thereupon my said estates shall go over and stand limited to the posterior uses and limitations thereof declared or directed by this my will, and the powers, privileges, and authorities annexed to the same, and the trusts and purposes to be declared thereof respectively shall be advanced and take effect as if the use or estate, uses or estates, so directed to determine, had never been created, and so *toties quoties* ; and that every person so assuming and taking the surname and arms of Egerton, in compliance with such proviso, * shall apply for and use his utmost endeavours to obtain, as * 7 soon as reasonably may be, his Majesty's license or authority under his sign manual, or an Act of Parliament to sanction the

same; and every person neglecting or refusing so to do shall be deemed to have refused to take such surname and arms as aforesaid, and the said proviso shall take effect accordingly as if he had actually refused so to do; but that notwithstanding such proviso, any person succeeding to the enjoyment of my said estates, and having any title of honour, shall be at liberty to retain the same, except as hereinafter provided in respect to the said John Hume Lord Viscount Alford and Charles Henry Cust. Provided always, and I declare my will to be, that the uses and estates hereinbefore directed to be limited to the said Dame Amelia Long for ninety-nine years, if she shall so long live, and to trustees for her life to preserve contingent remainders, and to the heirs male of her body, shall cease and be void in case there shall not be any issue male of her body lawfully begotten living at the determination of the several precedent uses or estates hereinbefore directed to be limited during the life of my said brother, and to the heirs male of his body, and to my said wife, and that in such case my said estates shall go over and be settled and limited as if the said Dame Amelia Long were actually dead without issue male; nevertheless, without prejudice to the said annuity hereinbefore given to the said Sir Charles Long and Dame Amelia Long, which shall in such case continue charged on my said estates in Shropshire and Cheshire, and be payable to them respectively as I have hereinbefore directed: Provided always, and I declare my will to be, that in case the use or estate hereinbefore directed to be limited to my niece, the said Dame Amelia Long, for the term of ninety-nine years, shall be

determined in her lifetime by virtue of the proviso lastly hereinbefore contained,

*8 my said estates in Shropshire and Cheshire hereinbefore charged with the payment of the said annuities of 4000*l.* to the said Sir Charles Long and Dame Amelia his wife respectively, shall also be charged and chargeable in addition to such of the same annuities as shall for the time being be payable with the payment of an annuity of 8000*l.* to the said Dame Amelia Long, or her assigns, during the remainder of her life, commencing from the time when such her estate for ninety-nine years shall be so determined, and with the like powers and remedies for the recovery thereof when in arrear; and such annuity of 8000*l.* shall be payable half yearly, and clear of all deductions, on the same several days of payment, and be raisable under the trusts of the said term of ninety years in like manner as I have

hereinbefore directed in respect of the said annuities of 4000*l.*; the first payment of the said annuity of 8000*l.* to be made on such of the said half-yearly days of payment as shall next happen after the commencement of the same annuity: Provided always, and I declare my will to be, that if the said John Hume Lord Viscount Alford shall die without having acquired the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, then and in such case the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void: and that if the Earldom of Brownlow shall descend and come to him, and he shall not have acquired, or shall not acquire, the title and dignity of Duke or Marquis of Bridgewater, to him and the heirs male of his body, before the end of five years next after he shall become Earl Brownlow, then and in such case the several uses and estates hereinbefore directed to be limited to the said John Hume Lord Viscount Alford, and to trustees during his life for preserving contingent remainders, and to the heirs male of his body, shall thenceforth cease * and be absolutely void, and that my said hereditaments and *9 real estates hereinbefore devised shall in either of the said cases thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if the said John Hume Lord Viscount Alford were actually dead without issue male: Provided also, and I declare my will to be, that if it shall happen that the said John Hume Lord Viscount Alford shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, with the immediate limitation over of such title and dignity to the said Charles Henry Cust and the heirs male of his body, or to the heirs male of his body if he shall be dead leaving issue male, and also, that the said Charles Henry Cust shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, then and in such case the use and estate hereinbefore directed to be limited to the heirs male of the body of the said Charles Henry Cust shall cease and be absolutely void: and that if the Earldom of Brownlow shall descend and come to him the said Charles Henry Cust, and he shall not have acquired or shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, before the end of five years next after he shall become Earl Brownlow, then and

in such case the several uses and estates hereinbefore directed to be limited to the said Charles Henry Cust, and to trustees during his life for preserving contingent remainders, and to the heirs male of his body, shall thenceforth cease and be void; and that in either of such cases my said hereditaments and real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations of this my will, as if the

said Charles Henry Cust were actually dead without issue

* 10 male: Provided also, and I declare my will * to be, that if my brother the said Francis Henry Egerton shall be created Duke or Marquis of Bridgewater, with such limitations over of the said title and dignity as that the same may, immediately after the failure of issue male of my said brother, come to the said John Hume Lord Viscount Alford and the heirs male of his body, and after them to the said Charles Henry Cust and the heirs male of his body; then and in such case my said hereditaments and real estates hereinbefore devised shall be settled, limited, and enjoyed in such manner as if the several provisos hereinbefore expressed for the determination of the uses or estates directed to be limited to the said John Hume Lord Viscount Alford and Charles Henry Cust, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, subsequent to the proviso for taking and using the name and arms of Egerton only, had not been contained in this my will: Provided also, and I declare my will to be, that if the said John Earl Brownlow shall in case of the death and failure of issue male of my said brother, in his lifetime be created Duke or Marquis of Bridgewater, the said title and dignity being limited to him and the heirs male of his body by the said Sophia Lady Brownlow his late wife only, and not being inheritable by or limited to any other issue male of the said John Earl Brownlow, the same shall be thenceforth equivalent to the acquisition of such title and dignity by the said John Hume Lord Viscount Alford, to him and the heirs male of his body, with limitation over to the said Charles Henry Cust and the heirs male of his body; and my said hereditaments and real estates shall be settled and limited so as to go and be enjoyed thenceforth and for the future as if the several provisos hereinbefore expressed for the determination of the several uses or estates directed to be limited to the said John Hume Lord Viscount Alford, and to the said Charles

* Henry Cust, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, subsequent to the proviso for taking and using the name and arms of Egerton only, had not been contained in this my will, notwithstanding the previous determination, if it shall happen, of the uses or estates directed to be limited to the heirs male of the bodies of the said John Hume Lord Viscount Alford and Charles Henry Cust, under any of such several provisos: Provided always, and I declare my will to be, that if the said John Earl Brownlow shall hereafter take any other title than Duke or Marquis of Bridgewater, so as to be inheritable by or limited to the issue male of his body by the said Sophia Lady Brownlow his late wife, or any of them, then and in such case the uses and estates hereinbefore declared and directed to be limited to the said John Hume Lord Viscount Alford and Charles Henry Cust, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, shall thenceforth cease and be void, and that thereupon my said hereditaments and real estate shall go over, and be limited and enjoyed according to this my will, as if the said John Hume Lord Viscount Alford and Charles Henry Cust were actually dead without issue male: Provided also, and I declare my will and intention to be, that my said hereditaments and real estates shall not be enjoyed by the said John Hume Lord Viscount Alford, or the heirs male of his body, if he shall by any means whatsoever succeed to or take any title (other than Duke of Bridgewater) to which the Marquis of Bridgewater shall not, if then, or would not if thereafter to be created, be superior in rank, or have precedence being of the same rank, nor by the said Charles Henry Cust or the heirs male of his body, if he shall take any title either by immediate creation, limitation over, or otherwise, other than Duke of Bridgewater,
* to which the Marquis of Bridgewater shall not, if then, or * 12 would not if thereafter to be created, be superior in rank, or take precedence if of the same rank; and that the uses and estates hereinbefore directed to be limited to such of them the said John Hume Lord Viscount Alford and Charles Henry Cust as shall take any such title contrary to this my will, and to trustees for his life to preserve contingent remainders, and to the heirs male of his body, shall thenceforth cease and be void; and thereupon my said hereditaments and real estates shall go over and be enjoyed accord-

ing to the subsequent uses or limitations of this my will, as if he or they taking such other title contrary to this my will were actually dead without issue male." During the life of testator's brother the trustees were to manage the devised estates. Each trustee, whether appointed by the will or by the Court of Chancery, was to receive 2000*l.* a year for his trouble; and powers to cut timber and to grant leases were conferred. After giving to his brother a power to create a jointure, a similar power was given to each successive tenant for years or for life, or tenant in tail in possession, except that the estates were never to be subject to more than two jointures at a time. The will then proceeded thus: "Provided also, and I declare my will to be, that if the use or estate hereinbefore limited to the said John Hume Lord Viscount Alford for the term of ninety-nine years determinable as aforesaid, or the use or estate limited to the heirs male of his body as aforesaid, shall be determined and made void by virtue or according to any of the provisos for that purpose hereinbefore contained, any jointure to be made or covenanted to be made by him as aforesaid, shall thenceforth cease and be void, and that if the use or estate hereinbefore limited to the said Charles Henry Cust for ninety-nine years determinable as aforesaid, or the use or estate hereinbefore limited to the heirs male of his body,

* 13 * shall be determined and made void by virtue or according

to any of the provisos for that purpose hereinbefore contained, any jointure to be made or covenanted to be made by him as aforesaid shall thenceforth cease and be void, and that any jointure which shall have been made or covenanted and agreed to be made by any person whose estate or interest shall be determined by reason of his refusing, neglecting, or discontinuing to use the name and arms of Egerton, or of his using any other surname or arms, or of his refusal or neglect to apply for the King's license or an Act of Parliament for that purpose, shall thenceforth cease and be absolutely void."

In a codicil executed on the same day, there was a recommendation to Lord Alford, in case he should come into possession of the trust estates of the testator, to allow his brother C. H. Cust to enjoy the Brownlow estates: "And if the said Lord Viscount Alford shall become Duke or Marquis of Bridgewater, so that my estates shall be permanently settled on him and his male descendants, that he shall settle or concur in settling the said other

estates to which he is now entitled as aforesaid upon his said younger brother and his male issue in a course of strict limitation; but I declare that this is to be understood as a recommendation only, and is not intended to be imposed upon him as an obligation, as otherwise his refusal to comply therewith might tend to defeat my object of uniting my estates to the title of Duke or Marquis of Bridgewater according to the limitations contained in my will, if it shall be the pleasure of the Crown to create such title so as to come to the heirs male of the said John Earl Brownlow and his issue male by the said Sophia his late wife."

The testator died without issue on the 21st October, 1823, and without having revoked or altered his will.

* At the time of the testator's death, Lord Alford was in *14 the twelfth year of his age.

On the death of the testator, the title of Earl of Bridgewater devolved upon his brother Francis Henry, eighth Earl of Bridgewater, who died on the 11th February, 1829, without having been married, and without having been created Duke or Marquis of Bridgewater. Upon his death, the Countess of Bridgewater, the widow of the testator, became entitled as tenant for life in possession to the real estates devised by the testator's will, and to the income of his residuary personal estate, and accordingly entered into the possession and enjoyment thereof, and so continued until the time of her death, which happened on the 11th of February, 1849.

Dame Amelia Long, who, before her death, had become Lady Farnborough, died on the 16th January, 1837, without leaving issue. Lady Farnborough and Sophia Lady Brownlow (who was the mother of Lord Alford, and of the respondent Charles Henry Egerton, in the testator's will described as Charles Henry Cust) were sisters, and were the only children of Lady Amelia Hume, who was the only sister of the testator. On the decease of Lady Farnborough, Lord Alford became the heir at law of the testator.

Sir Charles Long, who had been created a peer by the title of Lord Farnborough, died on the 18th January, 1838. Mr. Wilbraham Egerton was appointed a trustee in his place.

Edward Herbert Earl of Powis died on the 17th January, 1848, and John Earl Brownlow thereupon became the sole legal personal representative of the testator.

By indentures dated the 7th and 8th July, 1848, the respon-

*15 dent Edward James Earl of Powis was appointed a * trustee of the testator's will in the place of Edward Herbert Earl of Powis, and the real estate and residuary personal estate of the testator were then vested in John Earl Brownlow, Wilbraham Egerton, and Edward James Earl of Powis.

On the death of Charlotte Catherine Anne Countess of Bridgewater, on the 11th of February, 1849, Lord Alford became entitled in possession for the term of ninety-nine years, to be computed from the day next before the day of the death of the testator, if he Lord Alford should so long live, to the real estates, subject to the trusts of the testator's will and to the income of the residuary personal estate. Immediately after the death of the Countess of Bridgewater, Lord Alford obtained a license authorising him to take and bear the surname and arms of Egerton, which he continued to use and bear till his death. His son, the appellant, has since obtained a similar license. A license was also granted to the respondent Charles Henry Cust, who thereon took the name and arms of Egerton.

Lord Alford, who, after the granting of the license to bear and use the surname and arms of Egerton only, was called John Hume Egerton, died on the 3d January, 1851, and until his death continued in the possession and enjoyment of the real estates and of the income of the residuary personal estate of the testator. The income was stated to be above 60,000*l.* a year. The appellant is the eldest son and the heir male of the body of Lord Alford, and the heir at law of the testator.

There was not, at the time of the date of the testator's will or of his death, a Dukedom or Marquisate of Bridgewater, either in existence or in abeyance, and since the death of the testator it has not been the pleasure of the Crown to create any such Dukedom or Marquisate or any such title as Duke or Marquis of *16 Bridgewater. Neither * the appellant nor John Earl Brownlow has, since the date of the will, taken any title whatever.¹

On the 26th of February, 1851, the appellant filed his bill in the High Court of Chancery against the respondents, praying that it might be declared that he was, under and by virtue of the testator's will and codicils, equitable tenant in tail male in possession, of the estates, other than leaseholds for years, subject to the

¹ While these sheets were passing through the press (September, 1853), Earl Brownlow died.

trusts of the will, and absolutely entitled to the estates held upon leases for years, and the personal chattels, subject to the trusts of the will, but as to such leaseholds for years, and personal chattels subject to the gift over in the will contained, in the event of a tenant in tail male by purchase dying under the age of twenty-one years without leaving issue male of his body then living: and further praying that the trustees might account for the rents, and a receiver be appointed, until it should have been ascertained whether the appellant, or Charles Henry Egerton, was the party entitled to the possession and receipt of the rents, issues, and profits of the same estates.

Charles Henry Egerton demurred to the bill for want of equity.

Similar demurrers were filed by John Earl Brownlow, and Edward James Earl of Powis, and by Wilbraham Egerton the elder, William Tatton Egerton, and Wilbraham Egerton his son. The demurrers were argued before Vice-Chancellor Lord Cranworth, and on the 20th of August, 1851, his Lordship delivered judgment, overruling all the demurrers.¹ All the defendants after-

¹ 1 Sim. N. S. 464 – 490. The following is the report of Lord Cranworth's judgment on overruling the demurrers: —

LORD CRANWORTH. — "The bill in this case was filed by John William Spencer Brownlow Egerton, the infant son and heir of the late Lord Alford, against the trustees of the will of John William late Earl of Bridgewater and others, and it prays that the plaintiff may be declared to be equitable tenant in tail male in possession of the estates thereby devised, and that the trustees may be decreed to account with him for the rents and profits received by them since the decease of Lord Alford. The questions in the cause turn entirely on the validity of certain clauses contained in the will, and the bill therefore states the will at full length. The material clauses are as follows": — [His Lordship here read the limitations in the will.]

Then comes the proviso which gives rise to the present question. The effect of the will shortly is this, that first of all there was a substantial gift of the largest portion of the property to his brother for his life; he was not made tenant for life, but there was a large charge upon it, subject to 12,000*l.* a year to Lady Bridgewater his wife, then 18,000*l.* a year more to his brother, and the rest of the rents were to be applied in the mode directed in the will; and then, after the death of the brother, in case he should leave no issue (and he left none), it was to go successively for life to Lord Alford, and then to his first and other sons; then to Lord Alford's brother for his life; then to his first and other sons; and then to the Egertons.

That is not quite correct, for no one of these parties was to have it for his life, but for ninety-nine years if he should so long live, remainder to the trustees, the object being to keep the freehold out of them; and then it was given to the heirs male of the body, a phrase which he explains, and which is no erroneous use

* 17 wards * put in answers to the bill, and a replication having been filed and evidence gone into, the cause came on to be of an expression that was not strictly meant, because he says, — that is strictly what I mean : I mean it to be that they shall only have chattel interests, remainder to trustees, so as to keep the freehold in the trustees, — there is a limitation that must be contingent during their lives, namely, to the heirs male of their respective bodies, — and then afterwards to the Egertons in the ordinary way, those *in esse* to be tenants for life, with remainder to their first and other sons.

Then come these provisos :— [His Lordship read them ; he then stated the facts as to the positions of the various parties claiming an interest under the will, the bill, and the prayer for relief, and the demurrs which had been filed for want of equity. Afterwards his Lordship proceeded with his judgment as follows.]

“ The plaintiff, in order to establish his right to the relief which he asks, must make out two propositions : first, that the condition defeating the limitation in favour of the heirs male of the body of Lord Alford is a condition subsequent ; and, secondly, that it is a void condition, to which this Court will not give effect, as being either impossible or contrary to public policy. It is necessary for him to make out that the condition is a condition subsequent, for if it be a condition precedent, it is wholly immaterial whether the act, the doing of which constitutes the condition, is impossible or contrary to public policy, or even positively illegal. If a devise is made to take effect only on the happening of a particular event, then, unless the event happens, there is no gift, and all inquiry as to the character of the act on which the condition depends, is nugatory. Thus, if an estate be devised to A. for life, and if, during A.’s life, B. goes from London to Rome in three hours, then, on the death of A., to B. in fee : or if the devise were to A. for life, and if, during the life of A., B. shall effectually prevent any person from exercising the business of a baker in a particular town, then to B. in fee : or to A. for life, and if, during the life of A., B. shall assault and beat J. S. in revenge for an affront he had offered to the testator, then, at the death of A., to B. in fee. In the first case, the condition would have been impossible to be performed ; in the second, it would probably be considered as contrary to public policy ; in the third, it would be positively illegal. But still in none of these cases would B. acquire any title to the property devised, unless the conditions were performed. The impossibility, impolicy, or illegality of the act would afford a good reason for its not being performed ; but the consequence would be, that the devise would fail, not that B. would take without performing the condition. This principle is so clear as to need no illustration, and the only question therefore on this part of the case is, whether, on the fair construction of this will, the obtaining by Lord Alford of the title of Duke or Marquis of Bridgewater is a condition precedent to the vesting of any estate in the plaintiff as heir male of his body ; for if it is, then it becomes immaterial to consider whether the stipulation be or be not impossible or contrary to public policy : and I am clearly of opinion that the condition is a condition precedent.

“ In determining such a question, we must look not merely to the particular words in which the condition is expressed, but to the whole context of the will, or other instrument in which it occurs ; and if the meaning, as collected from the

heard on *the 26th of February, 1852, before Lord Cran- *18
worth (V. C.), acting for Vice-Chancellor Kindersley, under
whole context, is that no estate is to vest unless on a particular act being done, or
a particular event happening, then the condition, however it may be expressed,
is a condition precedent. Now here, Lord Alford's interest was an interest for
ninety-nine years, if he should so long live. No interest could vest in the plaintiff
until the death of Lord Alford his father. At that time Lord Alford either would
or would not have acquired the title of Duke or Marquis of Bridgewater; if he had
acquired it, then the estate of the plaintiff would arise; if he had not, then the
estate of Lord Alford's next brother arose. One of the two alternatives must
exist at the death of Lord Alford; and in the one case the property is to go to the
plaintiff, and in the other it is not. The happening of the one alternative or the
other is therefore clearly a condition precedent, carrying the estates, in the one
event, to the one line, and in the other event, to the other line. It is true that the
expression in the will is, that on the death of Lord Alford without his having
acquired the title of Duke or Marquis of Bridgewater, the estate thereby limited
to the heirs male of his body "shall cease and be void"; words which, if strictly
construed, are applicable rather to the effect of a condition subsequent, than to the
effect of a condition precedent. But I have already stated, that if the condition
is in its nature precedent, it is immaterial in what words it is expressed. No es-
tate in the heirs male 'could cease or be void,' because no such estate ever existed.
It could only arise at the death of Lord Alford; and at that instant the event
which, according to the expressions of the will, was to put an end to the estate,
had already occurred. In fact, therefore, it never existed. The contingency,
though described in the will as making void the estate of the heirs male, did not
and could not in strictness make it void, but would prevent its existing, and so is
to all intents and purposes a condition precedent. The reason why the testator
used the expression 'shall cease and be void,' is apparent from the context. The
proviso is so framed as to apply to either of two contingencies: first, that
which has happened, namely, the death of Lord Alford without having acquired
the title; and secondly, the contingency of Lord Alford becoming Earl Brown-
low, and not acquiring the title of Duke or Marquis of Bridgewater within five
years afterwards. In that latter event, the condition would (so far at all events
as relates to the estate of Lord Alford) be a condition subsequent, defeating his
estate, and the words 'shall cease and be void' would be strictly proper. This
sufficiently explains and justifies the use of the words; but even if no such ex-
planation could have been given, my view of the case would have been the same.
The condition in the events which have happened is in substance a condition
precedent, and so the precise words in which it is expressed are not material.

"It was argued, that as the condition when applied to this latter contingency,
that is, the event of Lord Alford becoming Earl Brownlow, and not within five
years becoming Duke or Marquis of Bridgewater, is clearly a condition subse-
quent, therefore it must be so in the other event also, namely, that which has
happened, of Lord Alford dying without acquiring the title; for that the same
words cannot import a condition subsequent and also a condition precedent; but
I can see no difficulty in so moulding the words as to make them meet both alter-
natives. In the one case they prevent any estate from arising, in the other they

*19 an order of *the Lord Chancellor. Lord Cranworth by his decree, dated that day, directed that the bill, so far as it defeat an already existing interest. In the one, therefore, they import a condition precedent, in the other a condition subsequent, so far at all events as concerns the estate of Lord Alford. When the meaning and effect of the words are once ascertained, there is no reason why they should not perform the double function. Another argument pressed on me as a reason for holding this to be a condition subsequent was founded on the jointure created in favour of Lady Alford. That jointure is, by an express clause in the will, made to cease in case the proviso defeating the limitations in favour of the heirs male of the body of Lord Alford should come into operation ; and it was argued that this was clearly a condition subsequent as to the jointure, and so must be subsequent throughout. But even assuming the premises to be correct, and that the condition is a condition subsequent as to the jointure, still the character of the condition remains unaltered, so far as it is a condition affecting the estate of the heirs male of the body of Lord Alford. It still remains a condition precedent as to that estate, just as if the jointure clause had not existed. Being therefore clearly of opinion that the plaintiff has failed to make out the first of the two propositions he was bound to maintain, in order to show that, as heir male of the body of Lord Alford, he is entitled to an account of the rents and profits received by the trustees, it might seem that I ought simply to allow the demurrs ; but this I cannot do, for a reason which I suggested during the argument.

"The bill is undoubtedly framed on the footing of the plaintiff being equitable tenant in tail male in possession, and so entitled to the rents and profits received by the trustees, and it asks no specific relief except that account, and, as consequent to it, the appointment of a receiver. To no part of that relief is he in my opinion entitled. But it appears from the bill that no settlement has yet been made by the trustees. Now there is a proviso in the will which declares, that if the defendant John Earl Brownlow should be created either Duke or Marquis of Bridgewater, with a limitation of the title to him and the heirs male of his body by his late wife only, that should be deemed equivalent to the acquisition of such title by Lord Alford, and the estates should be settled so as to be thenceforth enjoyed as if the proviso for determining the estates of Lord Alford and the heirs male of his body had not been contained in the will. If, therefore, this is a valid proviso, the plaintiff has clearly an interest in taking care that the settlement to be made shall secure to him his rights under this latter proviso, whatever those rights may be. Is then this proviso valid ? The question as to its validity is nearly, though not quite, the same as that which would have arisen if I had been called on to decide as to the validity of the condition carrying over the estates to the defendant Charles Henry Egerton, in case Lord Alford had become Earl Brownlow, and had not within five years become Duke or Marquis of Bridgewater, that is, its validity, treating it as a condition subsequent. The question then would have been, whether a condition defeating a vested estate in case the owner should not acquire a specific title was good. The question I have now to decide is, whether a condition defeating a vested estate in case a third person does acquire such title is good. I am clearly of opinion that it is.

"Though this precise question was not argued before me, yet the arguments

prayed *that it might be declared by the Court that the * 20 appellant was, under and by virtue of the testator's will and offered for the purpose of showing the validity of the condition defeating the estate of Lord Alford and the heirs male of his body in case he should not become either Duke or Marquis of Bridgewater, treating the condition as a condition subsequent, are for the most part applicable to the question of the validity of the condition defeating the estate now vested in Charles Henry Egerton, in case Lord Brownlow should become either Duke or Marquis of Bridgewater. First, it was said such a condition is void, as being impossible, for no man can at his pleasure, or by any exertion of his own, become, or cause another to become, a duke or a marquis; and it is certain that no estate once vested can be defeated by a condition that the grantee shall do an impossible act. But the fallacy of this argument is in the meaning which it attributes to the word 'impossible.' The doctrine is confined to acts in the nature of things impossible, and where, therefore, the condition would in effect be repugnant to and nullify the grant; it certainly does not extend to cases which may possibly happen, however improbable they may be. All this is made very clear by the instances given in Comyns's Digest.¹ 'If a condition,' Lord Chief Baron Comyns says, 'be to do a thing which by no means can be done, it shall be said to be an impossible condition: as, to go from London to Rome in three hours, or to assign a commission of bankrupt, for the commission cannot be assigned. But if the condition be improbable, and out of his power to do, yet shall it not be said to be impossible, as if the condition be that a married man shall marry such a woman; for his present wife may die before him: so, though it be out of human power, as "that it shall rain to-morrow." These instances exhaust the whole of this part of the subject and show that the condition here is not an impossible condition in the sense which makes such a condition void. It is not in the nature of things impossible that Earl Brownlow should be made Duke or Marquis of Bridgewater, with the required limitations to particular heirs male of his body. It is not certainly in the power of Earl Brownlow, or of the plaintiff to bring about such a result, but so neither is it in the power of a married man to marry another woman: in order that he may do so he must survive his wife and obtain the consent of the other woman; and whether he shall do so or not is a matter beyond his power to decide, and yet such a condition is expressly stated by Chief Baron Comyns to be good, and not void as impossible. If, indeed, the condition had been that the plaintiff should create Earl Brownlow Duke or Marquis of Bridgewater, there it would have been void, just as in the case of a condition to assign a commission of bankrupt; for by law this cannot be done: so if the condition were that the grantee should cause it to rain on a given day, this cannot by any means be done, and so would be deemed impossible and void. If, then, the condition is not void as being impossible, is it void as being against public policy, that is, as tending unduly to influence the Crown in conferring or withholding honours? I think not. The condition with which I am now dealing is a condition defeating the estate of Charles Henry Egerton, and those in remainder, in case Earl Brownlow should become Duke or Marquis of Bridgewater, with

¹ Title Condition, D. 2.

* 21 codicils, *equitable tenant in tail male in possession of the estates, other than leaseholds for years, subject to the trusts

a limitation of the title to particular heirs male of his body. There can be no doubt as to the power of the Crown to grant such a dignity, and I think it must be assumed that it will be granted or withheld according to what may seem just and fitting to the sovereign, without reference to the interest which may be collaterally affected by the grant. Should such a title be conferred, the effect will be incidentally to benefit the heirs male of the body of Lord Alford, and ultimately, in all probability, the defendant William Tatton Egerton and his children. Should it be withheld, the effect will be incidentally to benefit Charles Henry Egerton and his children. But her Majesty must be taken to stand perfectly neuter and indifferent as between the heirs of Lord Alford on the one hand, and Charles Henry Egerton and those in remainder after him on the other. If she should think fit to grant the proposed title to Earl of Brownlow, the heirs of Lord Alford will incidentally derive a great benefit. If she should not think fit to make such a grant, Charles Henry Egerton and those in remainder after him will derive the same benefit. But the Crown being perfectly neuter between those two lines, I do not see that there is any pressure on the sovereign to make, rather than to abstain from making, the grant.

In arguing the question whether the proviso defeating the estate of the heirs male of the body of Lord Alford would be good as a condition subsequent, several cases were suggested to show that the condition might embarrass the Crown, in the distribution of honours. The Crown, it was said, might desire to grant the title of Duke of Bridgewater to some other subject, and so ought not to be hampered by the pressure of the condition now under discussion. Again, Lord Alford himself might have performed some signal service which might make it expedient in the eyes of the Crown to create him a duke, with some other title than that of Bridgewater; and in such a case it was said the condition in this will would tend to fetter the Crown in the free exercise of its prerogative. These arguments, if well founded, would perhaps apply to the case which I have to consider, namely, the proviso defeating the estate of Charles Henry Egerton and those in remainder, in the event of Earl of Brownlow becoming Duke or Marquis of Bridgewater. But I can attribute no weight to such suggestions. It is a sufficient answer to them to say that, if such improbable circumstances should occur, it must be presumed the Crown would do what was right, without regard to any interests collaterally affected. In the first case, moreover, it may be observed that the Crown might create a second dukedom or marquisate of Bridgewater, if it should seem expedient so to do; but I do not place any reliance on this.

The only other ground relied on by the plaintiff's counsel was, that the proviso had a direct tendency to induce Lord Alford to use corrupt means for obtaining the proposed object. But this is not so. The object proposed by Lord Alford (and the same observation now applies to Earl Brownlow) was, that he should become Duke or Marquis of Bridgewater. To hold that this necessarily or naturally imports that he should use corrupt means for obtaining the end in view, would be to hold that such means were the necessary or natural steps towards the object in view: *prima facie* it must be supposed that such a condition will influence the party affected by it so to act as to merit the favour of the Crown by

of the * testator's will, and absolutely entitled to the estate * 22 held upon leases for years, and the personal chattels respec-

rendering eminent services to the State, not by acting dishonourably. If a condition subsequent be bad on this ground, so would a condition precedent; and if it be bad in the case of the high honours to which in the present instance it refers, so must it in all minor cases where the obtaining any distinction is the condition on which a right is to depend. Nothing, surely, is more common than to devise a living to a son if he enters Holy Orders. In order to obtain the benefit of such a gift, the son must become first a deacon, and then a priest: the natural course for such a purpose is by good moral conduct and competent study to fit himself for the Holy Office; but it cannot be stated as a thing impossible that he should attain the same object by simoniaecally corrupting the bishop by whom he is to be ordained. Such a possibility, however, could never surely be contended to affect the validity of the devise. So, in case of a devise to a party in case he obtains a degree in the university, or is called to the bar, or obtains a commission in the army. In all such cases it might be suggested as possible that the party to be benefited by the devise might be led to use corrupt means for attaining the proposed end. In these cases, indeed, the object might be said to be in some sort attainable by the party himself, and not to depend merely on the will of a third person, as in the case of honours to be conferred by the Crown. Undoubtedly that is so, but on this branch of the argument I cannot see that this makes any difference. If the possibility that the condition may lead to the use of corrupt means makes the condition void, it must do so, whether the attaining the object depends wholly on the will of another, or is more or less dependent on the party himself. The important point is the same in both cases, namely, that the party to be benefited may be led to resort to illegal acts to obtain, or to assist in obtaining, the proposed object. I think this is not material, for that, unless the use of corrupt means must necessarily or naturally be understood as those to which the party was intended to resort, the condition is not void merely because it may induce the party to attempt by unlawful means to obtain what by the condition it was meant he should get by lawful means. I may here advert to the case of *The Earl of Kingston v. Pierrepont*,¹ for the purpose only of distinguishing it. There the testator gave 10,000*l.* to be employed in procuring a dukedom, and the Court held the meaning of the will to be (indeed, it was impossible to put on it any other meaning) that the 10,000*l.* should be unlawfully employed in procuring the dukedom by corrupt means, and so that the gift was void. I do not doubt of the propriety of that decision, but, for the reasons I have already stated, I do not think it applicable to the present case.

" On the whole, therefore, I am of opinion that the proviso carrying back the estate to the heirs male of the body of the late Lord Alford, in case Earl Brownlow should attain the dignity of Duke or Marquis of Bridgewater with the stipulated limitations, is a valid proviso; and so that the plaintiff, though he has no estate in possession, has yet an interest in seeing that a proper settlement is made, securing to him his right under that proviso. And I think that the bill is so framed as to entitle the plaintiff under the prayer for general relief to call on

* 23 tively *subject to the trusts of such will, but as to such leaseholds for years, and personal chattels subject to the
* 24 gift over in *such will contained, in the event of a tenant in tail male by purchase dying under the age of twenty-one
* 25 years, without *leaving issue male of his body then living: and that John Earl Brownlow, Wilbraham Egerton the
* 26 elder, and *Edward James Earl of Powis, might be decreed to account with the appellant for such rents, issues, and
* 27 *profits of the estates from the death of his father received by them,—should stand dismissed out of Court: and, Lord Alford having died without having acquired the title and dignity of Duke or Marquis of Bridgewater, to him and the heirs male of his body, and also without the Earldom of Brownlow having descended to him, and neither the testator's brother Francis Henry Earl of Bridgewater nor John Earl Brownlow having been created Duke or Marquis of Bridgewater, his Lordship declared that in the settlement in the decree directed to be made, no present use or estate in possession ought to be limited to the heirs male of Lord Alford in the testator's freehold and copyhold hereditaments, nor any corresponding estates and interests by such will created or directed to be created in the leasehold hereditaments and personal chattels in the testator's will bequeathed to go along with his freehold hereditaments; and his Lordship declared that, upon the decease of Lord Alford, the respondent Charles Henry Egerton became entitled under the will of the testator to the hereditaments and real estates devised by such will and the codicils thereto, except the parts thereof sold or conveyed in exchange since the testator's decease under the power in that behalf in his will contained, and to the estates purchased under the directions in that behalf in such will contained, and also to the leasehold hereditaments and personal chattels for the term of ninety-nine years, computed from the day next before the day of the testator's

the Court to direct a proper settlement to be made according to the directions of the will, securing to him his possible interest in the event of Earl Brownlow becoming Duke or Marquis of Bridgewater. The result therefore is, that though on the death of Lord Alford the beneficial interest in the estates passed to the defendant Charles Henry Egerton for ninety-nine years, if he should so long live, subject to the proviso for defeating that estate, and so the plaintiff has no right to the specific relief which he asks for, yet he has a remote possibility of interest which prevents his bill from being demurrable: the demurrs, therefore, must be overruled."

decease, if he, Charles Henry Egerton, should so long live, discharged from the jointure and term of years for securing the same respectively expressed to be limited by the indenture of the 5th of April, 1819, but subject to the proviso in the testator's will contained for the determination of the estates of Charles Henry Egerton ; and that Charles Henry Egerton was then entitled to the receipt of the * rents, issues, and profits of the freehold, * 28 copyhold, and leasehold hereditaments, and real estates, and to the possession and enjoyment of the personal chattels : and with the above declarations, his Lordship ordered that it should be referred to the Master to approve of a settlement. The appeal was brought against this decree.

The Solicitor-General (Sir R. Bethell) and Sir F. Kelly (Mr. C. Hall was with them) for the appellant.—There are two questions in this case. The first is, whether the contingency as to the estate created in favour of the issue male of the first taker is subject to and depends upon a condition precedent, that Lord Alford should, during his lifetime, acquire the title of Duke or Marquis of Bridgewater, or whether this is the more familiar case of an estate for the life of Lord Alford, with a contingent remainder in tail to his issue male, and with a proviso under which, on the happening of a subsequent event, that estate determines, and other estates in favour of other persons arise. If the latter construction is given to the will, then the second question that presents itself is, whether this proviso or condition subsequent is valid or void in law. The appellant contends that the proviso is a condition subsequent, and that it is void.

As to the first question, the words of the proviso do not constitute a precedent condition at all, but form a mere ordinary proviso for the cesser of the estate, which had previously taken effect. They are words of cesser and determination, and not of creation. The other parts of the will show them to be so, and are wholly inconsistent with holding that the limitation to the heirs male of Lord Alford depended merely on his acquiring the title. The learning as to conditions is therefore inapplicable to the language of this will, which consists of nothing but a series of executory * directions to be abided by in making a future settlement of the property. This is a case of a trust in which the imitations of the estates are fully described by the testator, with a

view to the trustees carrying them into effect, and that which in the Court below was treated as a precedent condition is nothing more than a direction for the insertion of provisos for determining antecedent uses. When the language is that the occurrence of a particular event shall put an end to the estate, it is clear that in the mind of the writer of the will the estate must already be in existence. That is the language used here. A proviso for the cesser of the estate is of necessity to be treated as a proviso for the subsequent determination of the estate, and the form of the language used in the will must be looked to in order to determine whether the clause comes within that description. Here the same form is employed throughout. In the name and arms clause the words are "cease and determine and be void." It cannot be pretended that the obligation to take the name and arms was a condition to be fulfilled before the devisee took an interest in the estate. Then the estate was to be taken first, and if the name and arms were not assumed, the estate would be devested. The language used with respect to acquiring the dignity is almost the same with that used with respect to the name and arms, and indicates the same intention on the part of the testator, and must be construed in the same manner. The words are, "shall cease and be absolutely void." It would be a strange thing to say that one of these provisos, both being expressed alike, shall operate as a precedent condition and prevent the vesting of the estate, while the other is to operate only as a cesser of it.

The limitation to the heirs male of Lord Alford did not alone depend on Lord Alford acquiring the title, for the estate * 30 would come to them in the event of the testator's * brother being created Duke or Marquis, or of Lord Brownlow himself acquiring the title, even after Lord Alford's death. The Court below omitted to take this latter view of the case, and in so doing committed an error. It was said in the Court below that "no estate in the heirs male could cease or be void, because no such estate existed." That is a mistake ; the result depends upon the form of expression, and two things almost exactly alike in fact may have different legal effects, according as certain expressions are or are not inserted in or incorporated into the limitations themselves. The place in which these expressions are used will vary their effect. In Butler's Fearne,¹ where several instances of this

¹ Contingent Remainders, 12.

rule are given, it is said, "It is this different manner of framing the limitations which gives them their different nature and effect." The difference is observable here. The cesser here is not inserted in and forms no part of the original limitation. It comes after the limitation, and must operate, if at all, upon it as upon an already existing estate.

In this will there are six distinct directions, and the fifth and sixth are what, for convenience' sake, have been called equivalent clauses, by which it is declared that if the testator's brother shall be created Marquis or Duke of Bridgewater, with a limitation to Lord Alford and the heirs male of his body, and after them to Mr. C. H. Cust and the heirs male of his body, or if the Earl of Brownlow should be so created that the title would descend to his heirs male by the body of the testator's niece, the settlement of the estate shall be made as if the other provisos did not exist. As to the latter of these clauses there is a further proviso, that if the Earl of Brownlow shall acquire a title descendible to his heirs male, which title shall take precedence of that of Marquis or Duke of Bridgewater, the estate limited * to Lord Alford * 31 shall become void. These are all clearly conditions subsequent. The testator could not have intended, merely on the death of Lord Alford, to put an end to the estate limited to his heirs male; for, there being provisions in the will by which the estate might return to them, as in the cases of the two equivalent clauses, he would have been merely destroying a vested estate for the purpose of recreating it,—a course of conduct which no one, after looking at this carefully penned will, can suppose to have been deliberately intended; nor would the law permit this devesting and revesting of estates according to a mere caprice of the devisor.

The result of all the authorities and of a careful examination of the various provisos of the will is this: there is an estate created under the will, an estate to Lord Alford for his life, with remainder in tail to his issue male, if he should have issue male at the time of his death. That is, in terms, a contingent remainder, it is an existing estate created by the will, and the effect of the several provisos, which are to operate on that and the several other estates created by the will; is merely by way of defeasance. Not that the estate then in being is to be altered in constitution and character, to be converted from a remainder on one condition,

or more, to an executory devise, but that on the occurrence of certain events specified, one or more of them, then the estate previously created and existing shall cease, determine, and be void.

Then arises the question how far a direction of this kind as to the acquirement of a particular dignity, and the prohibition to take a dignity of any other kind, is consistent with the principle and theory of the law; in other words, how far it is consistent with public policy. It is a principle of the law, that every contingen-

gency is to be considered with reference to the tendency to * 32 produce a given result or a * given line of conduct; and the application of that principle is not restrained by any question of the probability that such conduct may be pursued or such result happen.

Thus a wager with a peer on the result of a case in this House would be void, not because it is probable that the result would be affected by such a wager, but because the wager would have a tendency to influence the conduct of the individual peer.

In *Simpson v. Lord Howden*¹ this House allowed an agreement between a member of the House and a railway company to be enforced; but that was because the subject matter of the agreement concerned his interest as a landowner, of which he was not to be deprived merely because he was a peer. The judgment in the Court below on this point was erroneous, because it went much on the probability of the result being actually produced, whereas the principle of law excludes that argument. It was excluded here in a case where the decision of a most eminent Judge, perfectly proper in itself, was held not to be sustainable, because he had an interest in the subject matter of the suit, though nobody pretended that that interest had in fact affected his judgment.²

The law will not permit any thing which has a tendency to be injurious to the interests of society. Thus marriage brokerage is forbidden, because every thing which relates to marriage ought to be kept free and pure. Bonds in restraint of trade are void on the same principle. In truth, what is denominated public policy is the obligation to perform all the duties which men owe to society; and any thing having a tendency to operate in opposition to that obligation is void.

* 33 * [LORD BROUGHAM.— Does this part of your argument apply also to the clause as to taking the name and arms ?]

¹ 9 Clark & F. 61. See also *Capper v. Earl of Lindsey*, 3 H. L. Cas. 293.

² *Dimes v. The Grand Junction Canal*, 3 H. L. Cas. 759.

It does not, for there the devisee is merely to use his best endeavours to obtain a license.

[**LORD BROUGHAM.** — But as that clause requires him to use his best endeavours to get the royal license, surely those endeavours may be by illegal means both as to the influence on those who advise the Crown, and also as to Parliament.]

But he is only bound to use the name and arms and to endeavour to get the license; if he makes the endeavour, he fulfils the condition ; and if he should not get the licenses, the estate will not be void, — but it will be void if he should not acquire the title. With reference to the directions as to acquiring the title, recollection may go back to the year when this will was made. Is it not fair to construe the direction thus ? — “ I give you the means of obtaining great political influence ; use it and acquire the title. If you will not, you shall lose the estate.” If that construction may be put on the provisos, then they are strongly significant of something which is in violation of the law. The case of *Kingston v. Pierrepont*¹ is clearly in point. The money there was left to be employed to gain the title by “ all lawful means ” ;² but still the Court of Chancery * absolutely refused to carry into * 34 effect the direction of such a devise.

[**LORD BROUGHAM.** — Would it at all affect your argument if the word had been *obtain* instead of *acquire*? He might obtain by petition to the Crown, by grace and favour.]

The change of the word would not in the least degree affect the argument. The same means might be employed to give force to the petition. In *Jones v. Randall*,³ a wager upon the result of an appeal to the House of Lords was held good, but that was because, being laid between two persons neither of whom had any means of influencing the judgment, and there being no fraud in it, the

¹ 1 Vern. 5. As this case was constantly referred to, it may be convenient here to insert the whole of the report. — “ The case was thus : Gearvase Pierrepont devises by his will 10,000*l.* to procure ‘ by all lawful means ’ a dukedom to the head of his family, so that it be within a year after his decease, and a bill was exhibited to have the money applied accordingly ; but upon a demurrer it was adjudged against the plaintiff, as well for that it is illegal to acquire honour for money, as also for that the bill was not exhibited within due time, so as to attach the money in equity within the year.”

² See the judgment of Lord St. Leonards, post p. 230 et seq. where the report in Vernon is corrected by reference to the Register-book. (Reg. Lib. 1680, A, fol. 463.)

³ Cowp. 37.

Court did not think it against public policy ; but Lord Mansfield there distinctly stated the principle that the consideration of public policy must govern the judgment of the Courts in such a case. In *Gilbert v. Sykes*,¹ the wager about the continuance of the life of Bonaparte was held to be void on the ground that it was against morality and policy ; and the rule was stated by Lord Ellenborough² to be this : " Wherever the tolerating of any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held to be void."

The principle of law, that the private interest of individuals shall not be allowed to interfere with the discharge of a duty, is fully established, and has often been enforced. Thus Blackstone states it as a rule of the common law, " that the guardian in socage must be one to whom the inheritance by no possibility can descend " ;³ and the principle on which this rule is founded is fully stated and explained in a previous part of the same

* 35 work.⁴ * The same principle has been applied to cases of money paid for the maintenance of bastard pauper children.

Thus in *Wilde v. Griffin*,⁵ in *Cole v. Gower*,⁶ in *The King v. Martin*,⁷ in *Watkins v. Hewlett*,⁸ and in *Clark v. Johnson*,⁹ the parish has been declared merely entitled to indemnity against actual expense ; and where bonds or other securities have been given to pay a larger sum than was required, they have been held incapable of being enforced, or, if the money has actually been paid, the parish officers have been held liable to refund the surplus. What has been the principle on which all these decisions were founded ? It has been this, that it was against public policy to allow the parish officers to have any interest adverse to their duty in the careful maintenance of the child ; and that principle has been applied, although it must be plain that in most cases the interests of these persons would be so infinitely small as to be impossible to produce any real effect on their conduct. Still the principle was the same, and the tendency to produce evil was made the ground of these decisions.

On this principle, too, are founded the rules against contracts

¹ 16 East, 150.

⁶ 6 East, 110.

² 16 East, 156.

⁷ 2 Campb. 268.

³ 2 Bl. Com. 88.

⁸ 1 Brod. & B. 1.

⁴ 1 Bl. Com. 461.

⁹ 3 Bing. 424, 11 J. B. Moore, 319.

⁵ 5 Esp. 142.

in restraint of trade ; and in *Mitchel v. Reynolds*¹ the law upon the subject is fully explained in the judgment of Lord Chief Justice Parker. In *Eltham v. Kingsman*² a wager about a person going only by one of two public conveyances was held to be illegal because it had a tendency to expose that person, as one of the public, and not only him, but others of the public, to inconvenience, and to affect injuriously that fair competition to freedom of choice which, for the public benefit, ought to exist in the trade of carrying.

* Then, again, observe the position in which this proviso * 36 places the members of the family towards each other. It is the interest of Lord Alford to acquire the title, but during his Lordship's life it is the interest of the Honourable Mr. Cust, his brother, to prevent him from acquiring the title ; again, if Lord Brownlow should accept any other title of higher precedence, which would be descendible to his heirs male, that would operate a forfeiture of the estate altogether. Each of the sons would therefore have a direct interest in thwarting the conduct and opposing the wishes of his father or of his brother. Surely the law cannot regard with favour a proviso that tends to produce such effects, but must desire to avoid any thing that would place all the members of a family in this sort of antagonistic opposition and rivalry to each other.

Again, if the case is considered with reference to persons discharging a public duty, it is clear that the proviso is illegal. The Crown is, by the constitution of this country, deemed incapable of doing wrong ; but the same constitutional supposition is not extended to those who are around the Crown and are its advisers. The object of this will would be sought to be carried into effect by influencing them,— the agents and ministers of the Crown,— and the Crown itself might in that way be subjected to an importunity and a pressure, to which it ought never to be made liable. But independently of the ministers of the Crown, what would be its tendency with regard to certain peers ? The disposition of the estates of the late Duke of Bridgewater has been to a different line from that to which the estates of the late Earl of Bridgewater are directed. The estates of the Duke are vested in a distinguished nobleman,³ who is perhaps desirous to succeed to the ducal

¹ 1 P. Wms. 181.

² 1 B. & Ald. 683.

³ Lord Ellesmere is the great-grandson of the first Duke of Bridgewater ; the second and third dukes died unmarried.

*37 title. But *if this proviso is good, the Crown cannot grant that title to him without involving innocent persons in the loss of a large estate. Now it is clearly contrary to the policy of the law that any subject should attempt in this way to influence the conduct of the Crown, approaching the Crown with a petition for a title, because if that particular title is not granted a large estate will be forfeited. Titles are the proper rewards for great achievements; they ought not to be sought solely to save the possession of estates; if conferred, they must be accepted.

[LORD BROUGHAM.—Is that so? George III. certainly made Charles Fox a Baron, and called him from the House of Commons, which he was not very willing to quit. THE LORD CHANCELLOR.—Have you any authority for saying that the Crown can compel a man to be a peer? And can the Crown compel a person to attend in this House by a particular writ and with a particular title? LORD TRURO.—Where the Crown can issue a writ, obedience to it must be enforceable. It is so in the case of a barrister made a serjeant. LORD LYNDHURST.—In the report to this House on peerages, that seems to be so.]

It must be assumed that, by the law of prerogative, the Crown has that right, although there may not be any instances in which, against the avowed opposition of the individual, the authority of the Crown has been so exercised.

The proviso is void for another reason. It imposes on the devisee the obligation to perform a condition which it is utterly out of his own power to perform. It is an impossible condition, and is therefore void. Thus, Lord Coke says:¹ “In case of a feoffment in fee with a condition subsequent, that is impossible, the estate of the feoffee is absolute.” Obligations called in law impossible consist

of two classes, those which are physically and those which are *legally impossible. In Sheppard’s Touchstone² it is said: “If the matter of the condition tend to provoke or to further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty, the condition for the most part is void.” Perkins³ is to the same effect, and he gives instances of such conditions. In Sheppard’s Touchstone it is said:⁴ “It is a general

¹ Co. Litt. 206 b.

² Preston’s Ed. 129 et seq.

³ Treatise on the Laws of England, tit. Condition, §§ 722, 726, 727, 728.

⁴ Preston’s Ed. 133, 134.

rule that such conditions annexed to estates as go in defeasance and tend to the destruction of the estate, being odious to the law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases." * * * * "And in a case where a condition doth tend to create an estate, there it shall have the most favourable exposition that may be." Here the words are words of forfeiture, and the condition must therefore be strictly construed.

The proviso is also void, because what is here required to be done is what the law would call *potentia remota*. *Cholmley's Case*¹ is a direct authority on that point; *Hoe's Case*² is to the same effect; and *Butler's Fearne*³ states the doctrine in the same way. A possibility cannot be mounted on a possibility. Now here the proviso is not merely that Lord Alford shall acquire a particular dignity, but that that dignity is to be one with a particular name and is to have particular limitations; that constitutes *potentia remota* if not *remotissima*, and must, therefore, be deemed an impossibility in law, and being found in a will as a condition subsequent, which would have the effect of defeating a previously created estate, it must be held to be void, and the estate cannot be affected by it. If the estate to the heirs male of Lord Alford should fail on account of * the non-performance of the con- * 39 dition, still the estate of the respondent C. H. Egerton will not arise, for that is only to arise in the event of Lord Alford dying without heirs male. The limitation in his favour and all the subsequent limitations will then fail altogether, *Monyppenny v. Dering*,⁴ and the estate will go to the testator's heir at law, who is the appellant, and who, in that view of the case, is entitled to the judgment of the House.

At the conclusion of the argument for the appellant, the pleasure of the House was taken as to the counsel who were to be heard for the respondents. Mr. C. H. Egerton was represented by Mr. Russell and Mr. Giffard; Mr. Rolt and Mr. Malins appeared for Mr. Egerton of Tatton. Both parties desired to sustain the decree of the Court below, but Mr. Rolt suggested that their interests were not the same in any other respect, and as their

¹ 2 Rep. 50.

² Winch, 54.

* Page 250.

³ 2 De G. M. & G. 145.

counsel would not adopt quite the same line of the arguments, he requested that Mr. Malins might be heard with him.

The Lords, however, decided that, as it was the common interest of these respondents to support the decree, the propriety of which was the only question then before the House, Mr. Russell and Mr. Rolt should be heard for their respective clients, and that it might then be decided whether there was any necessity for hearing the second counsel for the respective respondents.

Mr. Russell (with whom was *Mr. Giffard*) for the respondent, Mr. C. H. Egerton. — The decree here is right: All the provisos must be read in the same way, and they all show that if the title is not acquired, the estate tail in the heirs of Lord Alford shall not take effect. There was no intention that though Lord * 40 * Alford should not acquire the title, all the other limitations should go for nothing, provided only that he had male heirs, yet the argument on the other side really goes to that extent. The intention was that if Lord Alford did not acquire the title, the estate, instead of vesting in his heirs male, should go over to the next person named in the limitations. The case of *Monypenny v. Dering*¹ does not apply to this case, for express provisions for the estate going over were there made.

[LORD ST. LEONARDS. — Do you rest your argument on the first proviso alone? If so, you must be prepared to contend that none of the subsequent provisos overreaches, controls, or affects the first.]

That is the course of argument. This respondent need not anticipate the operation of any other proviso.

[LORD ST. LEONARDS. — But does not that involve you in this difficulty, that if the first proviso should be found to be governed or controlled by the subsequent provisos, your case is at an end?] .

The first proviso is the only one which has as yet come into operation, and that not having been complied with, the direction to carry over the estate has taken effect. It is impossible that any estate can be taken by the heir of Lord Alford, when the proviso on which Lord Alford was to acquire the estate has not been fulfilled. No estate taken by him could be continued after his death, if he did not fulfil the condition. He did not fulfil it, and the es-

¹ 2 De G. M. & G. 145.

tate then went over to the next in succession. There are other contingencies relating to Lord Alford's heirs male under which they might become entitled, and the will might have been so framed that while any one of these contingencies remained in suspense there might have been no disposition of the estate; but that has not been done.

* [LORD ST. LEONARDS.—Then you contend that the *41 estate in the heirs male ceased on the death of Lord Alford without performing the condition, but that it may arise again on the happening of another contingency. Has there not been a decision in this House that you cannot put an end to an estate and then renew, and then again destroy an estate, but that you must so mould it that all the parts may go on in regular harmony?]

The argument on the other side is, that the contingency itself keeps the estate open, and that there is no disposition of the profits of the estate between Lord Alford's death and the death of Lord Brownlow, by whom the title may be acquired so as to revest the estate in the heirs male of the body of Lord Alford. But that argument cannot be maintained: that would be an intestacy, and there is none here. The estate goes to the next person named in succession, though subject to be divested by the performance of the condition.]

The first question is whether this proviso is a condition precedent or subsequent. The former would prevent the vesting of an estate: the latter would defeat it after it had vested. Here no estate vested in the appellant, because Lord Alford did not acquire the title. It could not vest till then; there is an express declaration in the will to that effect. On his death, the estate would be determined; if one event happened, the estate would go to the heirs of his body; if another, it would take a different course. Whether the condition is precedent or subsequent must be determined by the nature of the condition itself, for the word "cease" cannot give it a character which it would not otherwise possess. The power to create a jointure is not important to show the construction that ought to be put upon the other parts of the will, for that power is expressly created by a distinct clause in the will, and must be taken * to be independent of the *42 provisos. It is not possible that an estate created under a power which was subject to a contingency, can be in a different position from the estate itself which was created under that

view to the trustees carrying them into effect, and that which in the Court below was treated as a precedent condition is nothing more than a direction for the insertion of provisos for determining antecedent uses. When the language is that the occurrence of a particular event shall put an end to the estate, it is clear that in the mind of the writer of the will the estate must already be in existence. That is the language used here. A proviso for the cesser of the estate is of necessity to be treated as a proviso for the subsequent determination of the estate, and the form of the language used in the will must be looked to in order to determine whether the clause comes within that description. Here the same form is employed throughout. In the name and arms clause the words are "cease and determine and be void." It cannot be pretended that the obligation to take the name and arms was a condition to be fulfilled before the devisee took an interest in the estate. Then the estate was to be taken first, and if the name and arms were not assumed, the estate would be devested. The language used with respect to acquiring the dignity is almost the same with that used with respect to the name and arms, and indicates the same intention on the part of the testator, and must be construed in the same manner. The words are, "shall cease and be absolutely void." It would be a strange thing to say that one of these provisos, both being expressed alike, shall operate as a precedent condition and prevent the vesting of the estate, while the other is to operate only as a cesser of it.

The limitation to the heirs male of Lord Alford did not alone depend on Lord Alford acquiring the title, for the estate * 30 would come to them in the event of the testator's * brother being created Duke or Marquis, or of Lord Brownlow himself acquiring the title, even after Lord Alford's death. The Court below omitted to take this latter view of the case, and in so doing committed an error. It was said in the Court below that "no estate in the heirs male could cease or be void, because no such estate existed." That is a mistake; the result depends upon the form of expression, and two things almost exactly alike in fact may have different legal effects, according as certain expressions are or are not inserted in or incorporated into the limitations themselves. The place in which these expressions are used will vary their effect. In Butler's Fearne,¹ where several instances of this

¹ Contingent Remainders, 12.

rule are given, it is said, "It is this different manner of framing the limitations which gives them their different nature and effect." The difference is observable here. The cesser here is not inserted in and forms no part of the original limitation. It comes after the limitation, and must operate, if at all, upon it as upon an already existing estate.

In this will there are six distinct directions, and the fifth and sixth are what, for convenience' sake, have been called equivalent clauses, by which it is declared that if the testator's brother shall be created Marquis or Duke of Bridgewater, with a limitation to Lord Alford and the heirs male of his body, and after them to Mr. C. H. Cust and the heirs male of his body, or if the Earl of Brownlow should be so created that the title would descend to his heirs male by the body of the testator's niece, the settlement of the estate shall be made as if the other provisos did not exist. As to the latter of these clauses there is a further proviso, that if the Earl of Brownlow shall acquire a title descendible to his heirs male, which title shall take precedence of that of Marquis or Duke of Bridgewater, the estate limited * to Lord Alford * 31 shall become void. These are all clearly conditions subsequent. The testator could not have intended, merely on the death of Lord Alford, to put an end to the estate limited to his heirs male ; for, there being provisions in the will by which the estate might return to them, as in the cases of the two equivalent clauses, he would have been merely destroying a vested estate for the purpose of recreating it,— a course of conduct which no one, after looking at this carefully penned will, can suppose to have been deliberately intended ; nor would the law permit this devesting and revesting of estates according to a mere caprice of the devisor.

The result of all the authorities and of a careful examination of the various provisos of the will is this : there is an estate created under the will, an estate to Lord Alford for his life, with remainder in tail to his issue male, if he should have issue male at the time of his death. That is, in terms, a contingent remainder, it is an existing estate created by the will, and the effect of the several provisos, which are to operate on that and the several other estates created by the will ; is merely by way of defeasance. Not that the estate then in being is to be altered in constitution and character, to be converted from a remainder on one condition,

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¹ Contingent Remainders, 12.

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[LORD ST. LEONARDS.—But is not this case more like *Proctor v. The Bishop of Bath and Wells?*¹]

It is not, for there the two different states of circumstances related only to one person. But on this point *Monypenny v. Dering* is a direct authority.

It is, however, contended that not one of these provisos is illegal and void. There is no legal objection to a testator indulging in as many caprices as he pleases in his limitations of his property, provided only that he does not offend the law against perpetuities. The other side must argue here that all the provisos must be struck out of this will, and that the estate has been given free and unfettered by any of them. The respondents are not under any such difficulty.

[LORD ST. LEONARDS.—The contention on the other side is that all these provisos have but one common object, and that that common object is illegal and void.]

That might be so argued if all the provisos formed but one, and that one was illegal, but they are all separate and distinct from each other; and about the legality of some of them there can be no doubt, and those which are without objection must be

* 48 carried into effect. The limitations in * truth are these, to

Lord Alford if he shall so long live, a contingent remainder, in one aspect, if he, or his brother, or Earl Brownlow, shall acquire a title. There can be no objection to the accomplishment of these events. If the title is not so acquired the estate goes over. Then comes the conditional limitation, which being in a will and being incorporated in the gift itself, operates as an executory devise. That is the proviso as to Lord Alford becoming Lord Brownlow and not acquiring the title of Marquis of Bridgewater within five years. In that case, and in the case of another dignity of higher rank being accepted, the estate to Lord Alford's heirs male is prevented and the next limitation arises; and so it will go on in regular order throughout the series.

[LORD ST. LEONARDS.—You are assuming it to be an executory devise; but it is a rule of conveyancing, that you shall not construe a devise to be an executory devise if you can make it a contingent remainder.]

Under the terms of this will, the devise to Lord Alford cannot be construed as a contingent remainder. On certain events hap-

¹ 2 H. Bl. 358.

pening, the trustees are to settle the estate. In such a case, the intention of the testator must be looked at in order to ascertain whether the trust is executed or executory. *Jervoise v. The Duke of Northumberland*,¹ *Papillon v. Voice*,² and *Rochfort v. Fitz-maurice*,³ in the last of which cases Lord Chancellor Sugden said:⁴ “In the present case there can be no room for doubt that the trust is executory; all trusts, to be sure, are, in some sense, executory, because the nature of a trust implies something to be executed; but here the settlor covenants to convey the property to trustees, to be settled to the uses *after mentioned, *49 as counsel shall advise.” That is precisely what the testator has done in this case.

[LORD ST. LEONARDS.—But the testator here has been his own conveyancer, he has said expressly what these limitations are to be.]

The rule hitherto has been, that when another instrument was to be prepared in order to settle the estates according to directions given by a testator, the devise was to be deemed executory, and if that is not still to be the rule, the most marked distinction between trusts executory and executed will be destroyed.

This limitation to the heirs male of Lord Alford having failed, the other limitations come into operation in succession. This case resembles that of *Luddington v. Kime*,⁵ on the authority of which Fearne⁶ says, that “Two or more several contingent fees may be limited merely as substitutes or alternatives one for the other, and not to interfere but so that one only take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect.” The limitations to the heirs male of Lord Alford did not take effect, and therefore the limitation to the next devisee, which was an alternative or substitute for the other, did take effect. This is what Fearne calls⁷ “a contingency with a double aspect,” for “each limitation was not expectant upon, and to take effect after, the other, but all were contemporary, to commence from the same period; not indeed together, but the one to take effect in lieu of the other, if that failed.” The testator himself gives his estate “upon trust to

¹ 1 Jac. & W. 559.

⁴ 1 Ld. Raym. 203.

² 2 P. Wms. 471; Butler's Fearne, 114, 115.

⁵ Butler's Fearne, 373.

³ 2 Drury & Warren, 1.

⁶ Butler's Fearne, 373.

⁴ 2 Drury & Warren, 21.

convey and settle to the several uses by his will declared and directed." In executing such a will, the Court will execute

* 50 it according to the strict rules of law. * The testator distinguished between these several gifts; where he gave an estate to the first and other sons, there he gave an estate for life to the ancestor, but where he has given to the heirs male of the body, he has given the estate for a term only to the persons whose heirs male are to take, and then has given to the heirs male; but he expressly says that the vesting of the estates in the heirs male shall be suspended till a certain event shall have taken place. In Lord Alford's case that event did not occur, and the vesting of the estates in the heirs male never took place. Here, if the testator has been his own conveyancer, and has said expressly what settlement he intended should be made, no new will must be made for him by any forced construction of his plain directions, but his intentions must be executed in the settlement. His explanation of any thing that is doubtful must be taken as conclusive.

It cannot be contended that the words "cease and be void" in these provisos decisively show the condition embodied in them to be subsequent; those words equally mean that no estate shall arise; the same words are used with respect to the estate to Lady Long. It is no objection to the provisos that they do not finally settle when the estate is to vest. It may be that every one of the provisos may be exhausted before the final settlement of the estate takes place, but so long as the intention of the testator is intelligibly expressed in those provisos, they must be adhered to. Nor is it any objection to those provisos, that, while the estate is in the hands of one of the persons named in one of the limitations, any thing may be done by which possibly the estate tail might be barred. Suppose that that could be done (which is, however, very doubtful), it is but a common inconvenience, and the possibility of its occurrence cannot alter the construction of the will.

It is not even because by one particular event, by the acceptance * of a certain title with certain limitations by Earl Brownlow, the estate may get back to the heirs male of Lord Alford, that therefore his original estate and their succession may not be defeated by his noncompliance with the condition. On this part of the case, the reasoning of the Court below is most satisfactory.

This brings the argument to the question of the alleged illegality of the condition. On the other side, it is contended that the tendency of the condition is to illegality, that that tendency is the test, and that the probability or improbability of such a result is nothing. No such argument can be maintained. Tendency is, as Sir W. Grant said in a case of this kind, "a test for every thing and a rule for nothing." There is not a condition that may not be said to have a tendency to illegality, none, the attempt to fulfil which may not lead to wrong. Estates for the life of a particular person, with remainders after that person's death, insurances on life,—every thing, in fact, which is in daily use in the business of the world, may be tainted with this supposed illegal tendency. The Court must first ascertain the object, then the means: if the object is bad, there is an end of the inquiry; if the object is good, then what are the means? As to them, unless their unlawfulness is clearly pointed out, they must be assumed to be good. The cases cited on the other side do not establish the proposition now contended for. Wagers are not in themselves illegal, *Jones v. Randall*,¹ and *Good v. Elliott*.² It is true that in *Da Costa v. Jones*,³ which was the case of the inquiry as to the sex of Chevalier D'Eon, and in *Gilbert v. Sykes*,⁴ which was the wager as to the assassination of Napoleon Bonaparte, the wagers were held illegal; but in the former of these two cases, the inquiry was one * irritating to the feelings of an individual, * 52 and of an indecent kind; and in the latter, the objection arose, not so much from the wager itself, as from a preceding conversation, which was said to show an immoral object. In *Evans v. Jones*⁵ the word "tendency" was used; but the facts there explain its use, they showed not a mere possible tendency, but a clear direction to evil. Here it may fairly be contended that the tendency is good. No one by corrupt or dishonest means could have the slightest hope of obtaining a title, but he who employed a large fortune beneficially for his country would establish a claim on the grace and favour of the sovereign. The case of *Kingston v. Pierrepont*⁶ does not apply, for the register book shows that there the money was left for the purpose of purchasing the title, and was to be so employed. It cannot here be presumed that the title

¹ Cowp. 37.

⁴ 16 East, 150.

² 3 T. R. 693.

⁵ 5 M. & W. 77.

³ Cowp. 729.

⁶ 1 Vern. 5.

is to be purchased, and especially purchased by corrupt means. The testator himself speaks of a minor matter; the license for the name and arms has to be obtained by "the grace and favour of the Crown," and he must have thought that the title was to be acquired in the same way. The word "acquire" cannot imply wrongly acquire, nor does it mean acquire as William I. acquired the crown of England. It is used in the sense only of receiving the dignity from the grace and favour of the Crown.

[LORD BROUGHAM.—It may mean "discreetly purchase."]

No, it means "obtain," "receive"; but it does not point out by what means.

Then comes the other side of that argument, namely, that the possible loss of the estate might have the effect of making a man refuse a peerage when the Crown designed to confer it upon him.

[Sir F. Kelly.—No; on looking into the authorities, it

* 53 *must be admitted that a subject cannot refuse the dignity, and the appellant, therefore, does not insist on that part of the argument. LORD BROUGHAM.—Does it follow, then, that a man may be created a peer without his knowledge, and cease to be a member of the House of Commons without his consent; that he may cease to be a commoner and become a peer, with all the disqualifications thereby entailed upon him, with privileges, certainly, but with disqualifications too?]

The Crown would not be affected in the use of its prerogative by this devise. The Crown cannot compel a man to be a peer. It is said in *Lord Abergavenny's Case*,¹ which was the case of a creation by writ, "the writ hath not its operation and effect until he sit in Parliament," "the command of the king by his *supersedeas* may be countermanded, or the person might have excused himself to the king, or he might have waived it, and submitted himself to his fine, as one who is distrained to be a knight, or one learned in the law is called to be a serjeant; the writ cannot make him a knight or a serjeant." That case shows that no absolute power exists in the Crown to create a peer by writ; he may be excused or submit to be fined.

[LORD TRURO.—That is a mistake; it is not "excuse or submit," but "excuse and submit"; and it is said in some other books that the Crown may go on fining.]

It is conceived that there is no compulsory power in the Crown

¹ 12 Rep. 70.

either by writ or letters patent, certainly not by the former, to compel a man to be a peer. But here, that question does not arise, for Earl Brownlow is already a peer, rendering all the duties of one, and the restraint, if any, is simply one of conferring a particular title, and can by no possibility affect the exigency of the public service.

Then as to the question of this devise being void on *ac- *54 count of its being a possibility on a possibility. What that is has been described by Fearne¹ as "the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other and yet not necessarily arising out of it"; and Butler, in his note in the same place, says that the language of Lord Coke,² that a possibility upon a possibility is never admitted by intendment of law, "must not be understood in too large a sense." And in *Cole v. Sewell*,³ the expression is treated as incorrect if not obsolete; and *Beck's Case*⁴ is an instance where a possibility on a possibility was recognised as creating an estate tail.

[LORD ST. LEONARDS.—A devise to the son of a son, living the grandfather, would be good. THE LORD CHANCELLOR.—A devise to a man with remainder to his first son is good, why not to a man with remainder to his first son who is christened George? LORD BROUGHAM.—A devise to A. B., a bachelor, on his having a son who marries. In that case there are four possibilities; A. B. may not marry, he may not have a son, the son may not live to be old enough to marry, or if old enough he may not marry; yet the devise would be good. LORD LYNDHURST.—There is nothing in the point.]

Then as to the restraint which these provisos are said to exercise on the grace and favour of the Crown. The only restraint here is in the case of Earl Brownlow, forbidding him to accept any other title than that of Duke or Marquis of Bridgewater. That restraint, which is one of a partial kind, does not make the proviso illegal. It is against the policy of the law to restrain trade in general, but a partial restraint of trade may be lawful, as an agreement not to *carry on a particular trade within a *55 limited district. Again, restraint upon marriage is unlaw-

¹ Butler's Fearne, 251.

² 4 Drury & Warren, 1, 2 H. L. Cas. 186.

³ 1 Inst. 25 b, 184 a.

⁴ Butler's Fearne, 352.

ful, but in *Perrin v. Lyon*,¹ a devise to the testator's daughter, with a proviso that the estates should go over in case she married a Scotchman, was held good. In the same manner, a particular restraint on alienation may be good (*Doe d. Gill v. Pearson*),² though a general prohibition on alienation would be invalid.

Lastly, as to the question of this proviso being against public policy. The first answer to that argument is to be found in the observation of Mr. Justice Burrough in *Richardson v. Mellish*,³ that the argument of public policy "leads you from sound law, and is never argued but when all other points fail." Public policy as a ground of legal decision was disclaimed in *Hibblewhite v. M'Morine*⁴ with relation to a contract for the sale of goods made by a man who at the time was not possessed of the goods which he contracted to sell; *Wild v. Harris*⁵ is to the same effect. So is *Simpson v. Lord Howden*, decided in this House;⁶ and in the judgment in that case in the Court below, it was expressly said⁷ that "illegality is not to be presumed; it is to be alleged and proved when it does not appear on the face of the instrument itself." That rule was in fact adopted in *Capper v. The Earl of Lindsey*,⁸ where an agreement made by a peer on conditions, upon the performance of which he was to withdraw his opposition to a railway bill, was enforced.

Sir F. Kelly in reply.—The real question now is whether
 * 56 these provisos are to * have the effect of conditions precedent to the remainder to Lord Alford's issue male, or whether they are to be read, as the testator clearly and unequivocally expressed them, that is, as clauses in defeasance of that estate, and in creation of another to be substituted for that which was so defeated. It is plain that the estate vested in the heirs male, and was not suspended till Lord Alford should obtain the peerage, or should succeed to his father and then obtain it within five years, and with the particular limitations mentioned in the will. That would have been postponing the estate to the happening of too remote an event. A less indefinite period for the determination of an estate

¹ 9 East, 170.

⁴ 7 C. B. 999.

² 6 East, 173.

⁵ 9 Clark & F. 61.

³ 2 Bing. 252.

⁶ 10 A. & E. 821.

⁴ 5 M. & W. 462.

⁷ 3 H. L. Cas. 293.

has recently been held too remote. In *Taylor v. Frobisher*,¹ a testatrix gave 1000*l.* to trustees to pay the interest to her daughter for life, and to the daughter's children who should live to the age of thirty years, "to be a vested interest on their respectively attaining thirty years, with survivorship among them, but if they died under thirty years without lawful issue, then the money was to be paid over to her son. The testatrix's daughter had two daughters, one of whom died before she was twenty-seven years of age, unmarried; the other survived her mother. The Court held that the word "vested" was used in the sense of not being subject to be devested, or indefeasible, and that the bequest to the children of the daughter was a valid bequest to such children as survived the daughter, and to the representatives of such as died in her lifetime; and further, that the gift over was void for remoteness. In *Barnes v. Allen*,² it was expressly stated that "a contingent interest may vest in right, though it does not in possession." And a condition subsequent may operate on such an interest as much as it may on a fee simple in possession. * Here the * 57 condition is subsequent and not precedent; the general form of the will shows it to be so, and if the testator had desired that it should be precedent, he well knew how to introduce words to effectuate that intention.

But supposing it to be a condition precedent, and that the condition is, as the appellant contends, void as against public policy, what will be the consequence? For the respondents, it is contended that the remainder to the issue of Lord Alford cannot then take effect, but that thereon the estate for life to the respondent Mr. C. H. Egerton comes into existence, and attaches with the other remainders over, subject to their being devested according to the terms of the will. On the other hand, the appellant contends that if the condition is void in law, Mr. C. H. Egerton cannot take the estate, for this condition, which is bad as to the others, must also be bad as to him, and he can only take on the failure of heirs male of Lord Alford. As there has not been a failure of heirs male, he cannot take at all.

Then as to the impossibility of the condition. The argument on the other side, that each proviso may be taken singly, and the good selected and the bad rejected, is denied. All these condi-

¹ 5 De G. & S. 191. See also *Tribe v. Newland*, 5 De G. & S. 236.

² 1 Brown, C. C. 181.

tions must go together. They constitute but one scheme to give effect to the intention of the testator, that intention being that these estates should be enjoyed with the title of Marquis or Duke of Bridgewater. What then is the effect of it? Assuming for the moment that the subject may refuse a dignity offered him by the Crown, whether by patent or by writ, then the proviso in the will would tend to make the devisee here refuse the acceptance of a particular title, though the Crown might desire for the public service that he should bear it. Or if the title was not refused, as

in the case of Earl Brownlow being made Duke of Lincolnshire instead of Bridgewater, *the acceptance of the Lincolnshire dukedom would operate on his descendants as a forfeiture of their estate.

[THE LORD CHANCELLOR.— Does not that argument apply to every shifting clause on which estates go over? You cannot help being the heir at law to A., yet being so may deprive you of B.'s estate.^{1]}]

On the other hand, assuming that the command of the Crown to take the dignity cannot be evaded, and such is believed to be the opinion expressed in the "Report on the Dignity of a Peer,"² then the Crown is placed under restraint in the free exercise of the prerogative, because the exercise of it may make a particular family forfeit a large estate. No man has a right to do any thing which shall tend to interfere with the administration of the law, the performance of political duties in great public servants, or the free exercise of the prerogatives of the Crown. Every matter of this kind must be dealt with according to the particular circumstances of the case. That is an answer to the argument derived from the fact that all wagers are not illegal. But as to these provisos, the cases of the parish officers are decisive. It is not what they will do, but what they may do, that the law considers, and therefore takes away from them that which has a tendency to make them do wrong. These provisos are bad in respect of three possible effects. First, as they respect Lord Alford, by placing him in a position in which it might be his interest to use the power which this enormous fortune would confer upon him in an improper manner, thus placing his interest in conflict with his duty. Secondly, as having a tendency to produce the same effect

¹ See *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524.

² 3d Report, House of Lords' Papers for 1829 (118), 75.

in relation to his duty towards his sovereign by holding out an inducement to him to resist the will of his sovereign, if that sovereign should * please to call for his counsel in this * 59 House by conferring on him the dignity of a peer with a particular title. And thirdly, which is the most important as to the effects to be produced on the sovereign and on the ministers, with relation to the free and uninfluenced exercise of the royal prerogative. It may not have been the intention of the testator to produce these effects, but they follow from his will. These provisos are, therefore, illegal, because they have a tendency to act injuriously on the integrity of subjects, and to fetter the free exercise of the powers of the Crown.

THE LORD CHANCELLOR. — This is a very important case, and we have the advantage of the attendance of the Judges to assist us in its decision. I feel myself under some little difficulty, as the case was originally heard before me in the Court below, but I did not think it right on that account to avoid the duty of sitting in judgment on it here. My mind is perfectly open to conviction upon it, but that makes it peculiarly important that I should not say one word as to how far my opinion may have been affected by the argument at the bar. The course I propose to adopt is simply to put to the Judges the questions to which I shall presently advert, in order to obtain their opinions as to the true construction of this will. The will devises certain estates to trustees, imposing on them the duty of making a settlement in a particular manner. In such a case the testator is sometimes what is called his own conveyancer, and directs what the settlement is to be, and the Court only carries his directions into effect. Sometimes the Court has to construe the will to find out the intention of the party, and then to frame the settlement according to that intention. It appeared to me that that was the case here. After the case had proceeded *some way in the Court below, I suggested to the * 60 counsel that this was purely a legal question and that I ought to stop further argument upon it, and send a case for the opinion of a Court of Law; but it was pressed on me that it was a case which must come to this House, and that, consequently, they were ready on both sides to take my decision at that moment. My indolence was tempted by the statement that I might decide the case either way, for that it was intended under any circum-

stances to be brought up here. I did not, however, think it consistent with my duty to act on that suggestion. I looked into the case carefully and decided it as if my decision was to govern its result. The case is now here, and the course I propose is, to state the will,—the death of the Earl of Bridgewater; the fact that Lord Alford was then in his twelfth year; that the brother of the testator died in 1839 without acquiring the desired title; that the testator's widow entered and died; that then Lord Alford entered and complied with the clause as to the name and arms; that Lady Farnborough died without issue; that Lord Alford died in 1851, having previously married and leaving issue of that marriage, but not having obtained the required title; that on his death his brother, Mr. C. H. Cust, entered and complied with the condition as to the name and arms; and that the appellant here is the eldest son of Lord Alford and the heir at law of the testator. I then propose to ask the Judges these questions. [His Lordship then proposed questions, which were afterwards agreed to.]

LORD ST. LEONARDS.—I wish to draw your Lordships' attention to the form of this will with reference to the questions now put to the Judges, taking care to avoid, as I ought, the expression of any opinion on this important case. The devise is to
* 61 * trustees in fee in trust to convey to certain uses, but the testator has directed that the estates shall be conveyed to the uses of the trusts and subject to the provisos afterwards stated, and in the mean time the estates are to go to the uses and subject to the powers and provisos stated in the will. The will then tells what these uses are, and the first question is one which is not submitted to the Judges, as it is a question of equity, namely, whether that which we call the trust, is in this case a trust to be executed or is executory. I do not doubt that every trust directed to be performed is executory in a certain sense, because the estate is in the trustees, and they are to convey to the uses, but, beyond that, I submit this as a point not at all in doubt, that this is not an executory trust in the sense in which we employ that term in equity. The testator here has been his own conveyancer; he has provided in technical terms for every possible event for which he intended to provide, and for the creation of every estate which he intended to limit. There is not a single limitation made to depend on the will which a Court of Equity could not

carry into effect under the directions therein contained. The testator has in fact not delegated to the Court any power, any discretionary power; he has used fit and proper words to describe every one of his intended limitations.

The following questions to be put to the Judges were then agreed to.

"Taking the facts from the printed cases, but reading the will as if it were a devise to the uses therein mentioned, and not a devise to trustees to convey to those uses, the following questions are put to the Judges:—

"1. On decease of Lord Alford, did his eldest son, the appellant, become entitled to any and what estate in the lands devised in remainder immediately expectant on the ninety-nine years term?

* "2. If he did is such estate liable to be defeated on any * 62 and what event or events, and may it or not come *in esse*, or revive again, on any and what event or events?

"3. On the decease of Lord Alford, did his brother Charles Henry Egerton, the respondent, become entitled to any and what estate in remainder immediately expectant on the said term?

"4. If he did, then is such estate liable to be defeated on the happening of any and what event or events?

"5. Are all or any and which of the several provisos void?

"6. Are the provisos or any and which of them to be treated as being conditions precedent?

"7. In the events which have happened, has the jointure appointed in favour of Lady Marianne Alford ceased?"

LORD CHIEF BARON POLLOCK, in the name of the Judges, requested time to consider these questions.

Ordered.

August 1.

The House sat to receive the opinions of the Judges.

Lord Chief Baron Pollock (who came up from the Home circuit), and Mr. Justice Williams (the Judge who remained in town during the vacation) attended the House. No other Judge was present.

LORD TRUBRO said that if there was any difference of opinion

among the Judges, so that one Judge could not deliver an opinion agreed to by the whole of them, it was most desirable that the House should have the advantage of hearing each of the learned Judges state his reasons for the opinion he had formed, and that this was especially desirable in a case like the present, where there were various points for consideration, and where, therefore, no large majority of the Judges might agree as to some of the * 63 points. As there * were but two of the Judges now present, and it was understood that there was a difference of opinion among the Judges, he moved that the consideration of the case should be adjourned till the other Judges could attend.

THE LORD CHANCELLOR entirely agreed with this proposal. When all the Judges agreed, there had been a custom for one to read the opinions of all ; but when they differed, it was of importance that each Judge should give the precise view which he took of the subject, so that the House might not only know the conclusion at which he arrived, but the steps by which he arrived at it. The difficulty here had arisen from the fact that the case was argued just as the Judges were going on their circuits, and notwithstanding the urgency for the decision, it was impossible to put the public to the inconvenience of having the circuit delayed. It had since been suggested that their Lordships would allow the opinions of all the Judges to be stated by such of them as could attend, and for that purpose the Lord Chief Baron had now come up from the Home circuit ; but this was a very unsatisfactory course, and would not have been adopted but for the pressure of circumstances. Perhaps, as it was not now likely that the session would be over before the lapse of a fortnight, the further consideration of the case could be adjourned, and as some of the circuits would then be finished, many of the Judges would be able to attend.

LORD BROUGHAM said it would be contrary to all precedent and practice to allow, in a case where the Judges differed, one Judge to read an opinion for one body of Judges, and another to read an opinion for the rest. The practice, which had in recent times grown up, of hearing one Judge read an opinion for all where they were unanimous, could not be extended and applied to a case where they differed.

LORD LYNDHURST fully agreed with his noble and learned friends.

* LORD ST. LEONARDS concurred.

* 64

The further consideration of the case was adjourned.

August 12.

The Judges then attended, and delivered their opinions.

MR. JUSTICE CROMPTON. — The arguments at your Lordships' bar in this case were properly divided into two branches, and the answers to be given to the questions propounded by your Lordships appear to me mainly to depend on the conclusion which is arrived at with reference to the two questions to which the arguments of the counsel were almost entirely directed, and upon the consideration of which the judgment of the Court below is founded. I propose, therefore, very shortly to state the opinion I have formed with respect to these questions, and to apply the principles on which that opinion is founded to the questions proposed to the Judges. Absence from town on circuit without the papers in the case, and without books to consult, and my not having been earlier aware that we were likely to be desired to give our opinions individually at present, will, I hope, furnish an excuse for not going more into detail, and for the hasty manner in which I have been obliged, in obedience to your Lordships' requisition, to put together what has occurred to me on the subject.

The first question debated at the bar was as to the nature of the estate limited to the heirs male of Lord Alford, and as to the nature and effect of the condition, proviso, or stipulation upon which that estate is to depend.

The second question was as to the legality of the conditions, provisos, or stipulations in question.

It appears to me quite clear, on the construction of this will, that it was never intended that any estate should arise in the heirs male of Lord Alford at his death, unless he * had ac- * 65 quired the desired dignity during his life, or unless what is made equivalent to his having done so had happened. The determination of the testator that the estates should not vest in the first or other sons of the parties taking the particular leasehold estates until the death of such parties, is most clearly expressed ; and in addition to his distinctly directing the limitations for this purpose, he states, in so many words, his reasons for such directions to be,

that the estates to be limited to the heirs male shall not vest in them before the death of their respective fathers. By making the limitations, after the long terms of years to the fathers, to the heirs male of the body, by forbidding them to be made to the first and other sons, and by stating his express intention that the vesting of the estates in the heirs male should be suspended, the testator made it too clear for argument that no estate was to vest in the heirs male until the death of their respective fathers ; and the limitation to the heirs male was conceded on all hands to be a contingent remainder to arise by way of use at the death of the father, in any person who might then be in existence, and who should be the heir male of his body. Till the moment of the death, it could not be ascertained whether there was any person in whom the estate was to vest, or in whose favour the use was to arise. The words of the proviso are said to be more applicable to the determining of a prior estate than to the preventing an estate from arising or vesting, but they are by no means inapplicable to the preventing the estate from arising. The words are, that in the event which happened “the use and estate hereinbefore directed to be limited to the heirs male, &c. shall cease and be absolutely void.” The use is to cease and be void ; and as the use is to be void at the time when it is to arise, it seems clear that it is never to come into operation so as to be capable of being

*66 devested. When it is argued that * the stipulation is to be construed as a condition subsequent, only so as to devest something before vested, and so therefore as to be inoperative if illegal, we must see that there is something vested or in existence to be devested or defeated.

It could not be, and was not argued, that the estate could arise for a moment and be devested *eo instanti* it arose. The will of the testator that the use should be void in the event that happened is far too clearly expressed for such a violent construction. It was said that there was an arrangement, a chain of limitations, a vested interest in the limitations and an existing interest which was to be defeated by a condition subsequent. I was quite unable to form any clear idea of what the counsel for the appellant contend to be the thing which is to be devested, and their very able arguments seemed to me entirely to fail in pointing out any thing which they could hold forth as a thing in existence to be defeated, destroyed, or devested.

The only doubt that occurred to my mind on this part of the case was, whether, as this is the case of a limitation of the legal estate to devisees or trustees to uses, and they are seised of the legal estate to many different arising and shifting uses, these uses could be treated as things created or existing, to be defeated and devested by matter subsequent, so as to let in the doctrine of the non-operation of an illegal condition if subsequent. I cannot, however, think that there can be any difference between a limitation under the Statute of Uses and a conveyance at common law in this respect; and I think that the real substance and effect, and not the words, are to be looked to, and that it must be seen whether the estate is to arise and have existence only if the event should happen, or whether it is to arise at all events, and be defeated if the event happens when it has once had existence.

*The true doctrine seems to me to be, that a proviso *67 which is invalid cannot be operative, either to create or to destroy. If the estate can only arise by that proviso being complied with, it fails in its creation; if the estate has once arisen, such proviso cannot destroy, and the estate remains unaffected. In the present case it seems clear to me that the testator intended and has most unequivocally expressed his intention, that no estate should arise in the heirs male, unless the dignity should be acquired before the time came for such estate vesting, and that the true construction of the will is, that unless that event happens, the heirs male should take no estate, and consequently that in the event which has happened no such estate could ever arise; and there being nothing to be devested or defeated, the proviso could not operate as a condition subsequent, to defeat or to destroy what never had existence, but must be construed as operating in the nature of a condition precedent, to prevent the arising of the estate. I should add that I have felt no difficulty from the argument as to the uses jumping about, as it was called, or as to the alleged impracticability of framing a settlement containing all the provisions. I am not aware of any rule of law against uses in such a settlement being made to jump backwards and forwards, and to vest and revest, according to the directions of the devisor or settlor. The provisions may be whimsical and capricious, and may operate cruelly in disappointing the expectations of families in favour of whose members the earlier uses may have come into operation; but there seem to be no limits to such dispositions,

if they do not offend against the rule as to perpetuity, and are not illegal in themselves. I see no reason why a settlement may not be made, providing, by way of shifting use, for all the contingencies on which the testator has directed the estates to shift

* 68 backwards and forwards; and the necessary complexity * of such settlement, if it can be made, is no argument against the legality of the provisions.

As to the question arising on the second branch of the argument, it lies on those who seek to set aside the disposition on the ground of illegality, to make out that such illegality exists; and I have heard no arguments to satisfy my mind that there is any illegality in making the estates in question depend on the desired title being conferred. It was by no means either unnatural or improper that a nobleman upon whom the earldom of Bridgewater had descended should wish that the higher title should again be conferred on his family. It might be his first object, that if the title of Duke of Bridgewater should be conferred on his branch of the family, the estates should go to the support of that title, associated as it well might be in his mind with the great works of art which had rendered that title illustrious. He may well have said, "If that title, which is my first object, is obtained through the grace of the sovereign, my lands and wealth shall go along with a title which I should be proud to have again in the family; but if that object is not attained, I wish and direct that the property shall go to the Egertons." It may be that he did not really prefer the Egertons; and that if he had known that his object would not have been attained, he would not have disinherited his more immediate relations; but this is mere speculation, and by the plain words of the will he has chosen to prefer the Egertons if the dignity be not acquired within the specified time by the earlier takers. It seems to me extremely dangerous to limit the power of disposition on any general notion of im-

policy, without some definite rule or principle being shown to apply to the case. The principle that no disposition could * 69 be allowed which might hold out a temptation * to commit crime is clearly much too general to be supported. It would embrace almost every disposition and contract where a party is to expect a benefit from the death of another, nor can it be the true test whether impure or corrupt means may possibly be used.

Although it may be impossible to lay down any definite rule which should include every case, that which was suggested by Mr. Rolt in his argument seems to me a truer and less objectionable test,—whether there is any thing illegal in the object to be attained, and whether, if not illegal, that object is either necessarily or according to the course suggested by the party to be attained by wicked or illegal means. If the object be illegal, as murder, theft, or other crime, of course the stipulation is illegal. So if the object can only be obtained by corruption or wickedness, the stipulation will be illegal and void ; and even if the object be laudable, and may be attained by honourable means, still if it can be attained by improper means, and the party creating the condition makes such means the mode of performing it, the condition will be illegal and void. Thus in the case of *The Earl of Kingston v. Pierrepont*,¹ the means to be employed were obviously illegal and corrupt. It was impossible for the Court to decree the 10,000*l.* to be applied to the procuring of a dukedom, and it was obviously intended by the testator that the money should be applied in corruption ; and no legal means of applying it to procure the dukedom could be pointed out. In the present case the object seems to me to be legal, and I cannot perceive that any corrupt means were likely to be used, or to have been available if they were. Suppose the father of any noble and learned lord who has attained the highest judicial dignity in this country, to have anticipated the future elevation of his son from his rising talents, and to * have said, “ If my son becomes Lord Chancellor, I should like him to have my family estate, from which I should wish him to take the title of his peerage, and in such case I direct that the estate shall go to him,” could it be said that such a disposition was void as necessarily leading the son to the employment of mean arts in getting on in his profession, or of corrupt practices at elections to obtain a seat in Parliament, or of political subserviency when such seat should have been obtained ? Could it seriously be said that such a devise would be void on the ground of the Crown being hampered, or of the advisers of the Crown not being likely to be able to withstand the corrupt influence which might be brought to bear upon them ? Cannot a man who is making a will in anticipation of the different events which may happen to the members of his family say, that if his kinsman is made a

bishop or dean, a judge or general officer, his estate shall go to him, without the disposition being void on general notions of impolicy?

Most of the cases which have been relied upon on this subject are cases of idle wagers, the decision of which would have necessarily affected or led to the improper discussion of the rights or affairs of third parties, or would have involved indecent discussions; and such wagers were most properly held to be void. I agree entirely with the authorities on this subject which point out the danger of relying on general notions of public expediency or policy, which vary so much from time to time. It is impossible to see the extent to which such a rule of decision may lead, and it must tend to the greatest uncertainty as to individual rights in each particular case, if Courts of justice are to decide upon nice speculations on what they imagine may be the general effect as to public policy, without some definite mischief to the public being

clearly shown to apply to the case. In the present case

*71 I am not satisfied that * there is any illegality either in the object or in any proposed means of acquiring it, and I do not see that it was necessarily or in the ordinary course of things to be attained by corrupt practices. I cannot think that it ought to be assumed as a ground for a judicial decision that the Crown is likely, in a matter affecting the interests of the public, to be induced to act upon any grounds inconsistent with the public good. The condition, therefore, by which the estate is made to depend on the acquisition of the title does not seem to me to be illegal.

Upon these principles, I answer your Lordships' questions as follows:—

1st. In my opinion the appellant did not, on the decease of the late Lord Alford his father, take any estate in the lands devised.

2d. It is difficult to answer this question, as I do not see how the estate is supposed to have arisen. If an estate is supposed to have arisen in the appellant at the moment of his father's death, subject to be devested at the same moment by the condition, if good, treated as a condition subsequent, I should think that the estate would be defeated by the condition, which does not seem to me illegal.

In the event of Lord Brownlow acquiring the desired title, the appellant would, under what was called in argument the second

equivalent clause, take an estate in the lands "thenceforth." The limitation is, that in such case the lands should "thenceforth and for the future" go and be enjoyed, &c.; and it appears to me that in such event a new use would arise at the time, by which the estate would "thenceforth" be vested in the appellant.

3d. I think that on the decease of Lord Alford, his brother became entitled to the term of ninety-nine years, under the limitation in his favour.

*4th. The estate of the brother would be defeated if he *72 became Earl Brownlow and did not acquire the dukedom or marquisate in five years, in which case the estates would go over to the Egerton family, or if the present Earl Brownlow became Duke or Marquis of Bridgewater, in which case a use would arise in favour of the appellant.

5th. I have entertained some doubt as to the validity of the last two provisos, which would naturally lead to the refusal to take a particular title from the Crown; I have not been able to satisfy myself as to the power of the Crown to impose compulsorily any particular title on a peer. Subject to this doubt, I do not see that any of the provisos are illegal, and I think that if the last two are bad, they are clearly separable from the rest, and do not affect the validity of those which are good. Each proviso seems to me to operate as a limitation of a particular use or set of uses, and I see no difficulty in separating the last two, if bad, from the good.

6th. I think that all the provisos from which it appears, according to what I have said before on this part of the subject, that the acquiring the dignity is to precede the vesting of the estate, are to be treated as conditions precedent, whatever may be the language used, and notwithstanding the words are words of determination, and I see no difficulty in the same words being treated as creating conditions precedent or subsequent, according to the different subject matter to which they are to be applied. Thus the provisos as to the acquiring the title are in the nature of conditions precedent, with regard to the estates of the heirs male, whilst those for determining the terms for years in the lifetime of the termors are to be treated as conditions subsequent.

7th. Assuming that the estate in the jointure arose (notwithstanding any intention to be collected from the will, * that *73 the jointress should never take if the title had not been acquired before the death, or until a condition made equivalent had

been performed), I think that, in the events which happened, the interest in the jointure ceased.

MR. JUSTICE WILLIAMS. — Your Lordships have directed her Majesty's Judges to take the facts of this case from the printed Papers, but to read the will as if it were a devise to the uses therein mentioned, and not a devise to trustees to convey to those uses; and the first question proposed for our consideration is, whether, "on decease of Lord Alford, his eldest son, the appellant, became entitled to any and what estate in the lands devised in remainder immediately expectant on the ninety-nine years term." To this question I beg to answer, that I am of opinion that the appellant did not become entitled to any estate therein. He can only claim under the limitation in remainder to the use of the heirs male of the body of his father, which limitation the will proceeds to subject to the several provisos for the determination thereof thereafter contained; and the first of those provisos is, that if Lord Alford "shall die without having acquired the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, then and in such case the use and estate hereinbefore limited to the heirs male of his body shall cease and be absolutely void." As, in fact, Lord Alford died without having obtained the required dignity, it is plain that the appellant can claim no estate if this proviso is allowed to operate; but, on his behalf, it is contended that the proviso ought not to be allowed to operate, because it is against law, and is also in the nature of a condition subsequent. The case therefore falls, it is said, within

the well-known rule which is thus laid down in the Touch-
*74 stone,¹ *after having expounded what conditions are
against law: "In all these cases, if the condition be subse-
quent to the estate, the condition only is void, and the estate good
and absolute. If the condition be precedent, the condition and
estate both are void, for an estate can neither commence nor
increase upon an unlawful condition."

In my opinion, however, the proviso is neither against law, nor in the nature of a condition subsequent. I will defer giving my reasons for thinking that it is not against law till I come to answer the subsequent question of your Lordships on that subject, and for the present I will confine myself to my reasons for

¹ Preston's Ed. 132.

thinking that the proviso is not in the nature of a condition subsequent.

The broad character of a condition precedent is, that it is such as must be performed before the estate can vest; that of a condition subsequent, that it is such as devests a vested estate. Now the event contemplated in the proviso in question must necessarily occur, if at all, before Lord Alford's death, and consequently, before any estate would possibly vest in any one as his heir. But it is argued for the appellant, that the will is evidently the work of an experienced conveyancer, who must have fully understood the legal import of the words employed, and who could hardly have used such phrases as "subject to the several provisos for the determination thereof," and "the use and estate hereinbefore limited to the heirs male, &c. shall cease and be absolutely void," unless he had intended to make the proviso operate as a condition subsequent. This is but a conjecture, however plausible. And, however clouded by technical phraseology, the substance of the intention of the testator, as pronounced by this proviso, is, in my opinion, quite clear; viz. that Lord Alford's heir male is to take no estate at all unless Lord Alford shall have acquired the *prescribed dignity. If this be so, the doctrine of absolving *75 unlawful conditions subsequent, which is founded on the reluctance of our Courts to devest a vested estate, can surely have no application.

The second question proposed by your Lordships is, whether, if the appellant took any estate, "such estate is liable to be defeated in any and what event or events, and may it or not come *in esse*, or revive again, in any and what event or events?" To this question I answer, that the appellant cannot take any estate, unless on the supposition that the first proviso is void; and if this is to be conceded, it seems to me necessary to concede also that all the other provisos are likewise ineffectual, and consequently that the estate taken by the appellant is not liable to be defeated in any event.

The third and fourth questions are, "On the decease of Lord Alford, did his brother Charles Henry Egerton, the respondent, become entitled to any and what estate in remainder immediately expectant on the said term?" and "If he did, then is such estate liable to be defeated on the happening of any and what event or events?" To these questions I answer, first, that in my opinion

the respondent Charles Henry Egerton becomes entitled to an estate for ninety-nine years, if he shall so long live ; and, secondly, that such estate is liable to be defeated on the happening of the event contemplated by the fourth proviso (viz. if the earldom of Brownlow descend to him and he shall not have acquired the prescribed title before the end of five years after he shall have become Earl Brownlow), and also on the happening of the event contemplated by the sixth proviso (viz. if Lord Brownlow be created Duke or Marquis of Bridgewater, &c.), and also on the happening of the event contemplated in the seventh proviso (viz. if Lord

Brownlow shall take any other title than that of Duke or Marquis of Bridgewater, &c.), and also on the happening * of the event contemplated in the eighth proviso (viz. if the respondent Charles Henry Egerton shall take any title other than Duke or Marquis of Bridgewater, &c.).

The fifth question proposed by your Lordships is, "Are all or any and which of the several provisos void ?"

To which my answer is, that, in my opinion, none of them is void. The eight provisos may be ranged in three classes : first, the first four, which require the acquisition of the prescribed dignity by Lord Alford, and the respondent Charles Henry Egerton, respectively ; secondly, the two next following, which render the acquisition of the dignity by the testator's brother, or by Lord Brownlow, equivalent to its acquisition by Lord Alford ; thirdly, the last two, which prohibit Lord Brownlow and his sons from accepting any other dignity. As to the first class, three grounds of objection have been taken to the provisos of which it consists : first, that they are void for impossibility ; secondly, for remoteness ; thirdly, as being against law. With respect to the first of these grounds of objection, it appears to be enough to refer to Butler's note (1) to Co. Litt. 206 a, where it is said, " It should be observed that a condition is then only considered in the eye of the law as impossible at the time of creation, if it cannot by any means take effect " ; " but if it only be in a high degree improbable, and such as is beyond the power of the obligor to effect, it is not then considered impossible." With respect to the second ground of objection, the doctrine of *potentia propinqua* and *potentia remota*, on which it is founded, has been long ago denied in its larger sense, and explained as being applicable only to cases where limitations are void, either for want of a person having capacity to take, or

from the uncertainty of the person who is to take. The authorities on this head will be found collected in a learned note to the *Rector of Chedington's Case*.¹

* It remains to consider the objection that these provisos * 77 are against law. In order to sustain this proposition, it must, in my opinion, be made to appear either that the provisos have an unlawful object, or that, in order to their performance, they require some act or course of conduct which is *malum in se* or *malum prohibitum*; or that they forbid the doing of something which the law requires to be done, or impose some restraint which is against law, as being mischievous to the community. The object of the provisos, viz. that a particular dignity shall be borne by those who are to enjoy the estates of the testator, is surely not unlawful; nor does the attainment of the object demand, nor does the will dictate, or require, or suggest, that, in order to attain it, any thing shall be done or omitted, the doing or omission of which would counteract the law or the public good in any way. It is true that in order to comply with these provisos corrupt means might be employed, which would violate the law and cause a dereliction of duty on the part of those who are so deeply interested in the performance of them. But it is scarcely possible to suggest any condition to be annexed to an estate of which it may not be affirmed that a man of corrupt mind, who is interested in the performance of it, may be tempted to have recourse to unlawful means for that purpose. The true question, however, in my judgment, is, whether such unlawful means are the requisite or appropriate course for the performance of the condition; and it seems to me clear that no such proposition can be affirmed with respect to the provisos in this will, or any one of them.

Many cases were cited in the argument with respect to wagers, in order to show that contracts have been held void on the mere ground of their tendency to encourage illegal acts. But these decisions are, I think, inapplicable to the present question, inasmuch as they are to be attributed * either to the strong * 78 anxiety of the Courts to discourage wagers, or, as in the case of *Da Costa v. Jones*,² proceeded on the principle that the voluntary act of two indifferent persons, by laying a wager, shall not be permitted to lead to a judicial inquiry which may affect the inter-

¹ 1 Rep. 148 a. Edition by Thomas and Fraser, 365.

² Cowp. 729.

est or the feelings of a third person ; or, as in *Evans v. Jones*,¹ on the ground that no man has a right by his own act to acquire an interest in the result of the proceedings of a Court of justice.

With respect to the case of *Cole v. Gower*,² where it was held that parish officers who had taken a promissory note for a sum certain from the father of a bastard child, in order to meet the expenses of its maintenance, could not enforce the payment of the note ; the Court certainly, as one ground of its judgment, put forward the circumstance, that by taking a sum certain the parish officers were exposed to the temptation of getting rid of the burden of the child's existence as soon as possible. But the proper ground of that decision appears to me to be that the Statute 6 Geo. II. c. 31, only authorised the parish officers to take security to indemnify the parish, and not a sum certain, which might exceed an indemnity. That this was the true principle of the decision appears to me to be demonstrated by considering, that no objection could be made to a contract by which the father of a bastard child undertook to pay a sum certain to some person, not a parish officer, in consideration that he would take care of and maintain the child until it should attain a certain age. And yet that person would, by the terms of the contract, be put under a temptation at least as great as that suggested in the case of the parish officers.

*79 Another topic remains to be considered which was *employed on behalf of the appellant ; viz., that these provisos are against law, as being calculated to embarrass the Queen in the exercise of her prerogative of conferring dignities. But, in my opinion, it would be highly unbecoming in us to assume or conjecture that the Crown could be at all influenced or affected by such unconstitutional motives or considerations as those which have been suggested as the foundation of this part of the argument.

With regard to the last two of the provisos, they are certainly open to an objection which seems to me of a graver character than any of those to which I have as yet adverted. It is said that they impose the obligation of refusing to accept a dignity other than that of Duke or Marquis of Bridgewater, if her Majesty should deem it right to bestow such title. And it is argued, that a man is bound by law to accept whatever dignity the Crown pleases to confer, and consequently that these provisos are void as requiring the desertion of a legal duty.

¹ 5 M. & W. 77.

² 6 East, 110.

Lord Cowper, in *The Duke of Queensberry's Case*,¹ was of opinion that the King could not create a subject a peer of the realm against his will ; but Lord Trevor, *contra*, held that the King had a right to the service of his subjects in any station. So Lord Coke says,² “ If the King by his writ calleth any knight or esquire to be a Lord of the Parliament, he cannot refuse to serve the King there, *communi illo concilio*, for the good of his country.” I think, therefore, it cannot be denied, that where a man is called by a writ to sit as a peer of Parliament he is bound to obey it ; but I am not aware of any authority or principle that he would be bound to accept a patent of nobility conferring on him any particular dignity, nor to *sit in Parliament as a peer * 80 with any particular title, if a writ were to call upon him to do so.

The absence of direct authority and the doubts that are entertained by some of my learned brethren on this point make me feel not a little distrustful of my own opinion ; but, in my judgment, as the several provisos are entirely distinct and independent of each other, the unlawfulness of the last two, if they are unlawful in this respect, would not at all affect the validity of any of the others ; and this point, therefore, appears to me to be immaterial with respect to your Lordships' decision of this appeal.

The sixth question put by your Lordships is, “ Are the provisos, or any or which of them, to be treated as being conditions precedent ? ”

To this my answer is, that I am of opinion that the first and third are to be treated as conditions precedent, in the sense that the event of the acquisition of the desired dignity by Lord Alford, or his brother the respondent, must precede and give effect to the estates limited in remainders to their heirs male respectively (in accordance with the case of *Carwardine v. Carwardine*).³ Again, as to the second and fourth provisos, the not happening of the events therein mentioned would defeat the existing estates of Lord Alford and his brother respectively, by way of condition subsequent (or, to speak more accurately, by way of conditional limitation), but it would be a condition precedent as to the estates limited to their heirs male, in the sense that it would prevent those estates from coming into existence.

¹ 1 P. Wms. 592.

² 4 Inst. 44.

³ 1 Eden, 27 ; and Fearne Cont. Rem. 388.

The seventh question is, "In the events which have happened, has the jointure appointed in favour of Lady Marianne Alford ceased?"

By an express clause in the will, it is to cease and be void in case the proviso defeating the limitation in favour of the heirs male of the body of Lord Alford shall operate. Having already expressed my opinion that this proviso has come into operation, it is but a matter of form to express my further opinion that the jointure has become void.

MR. JUSTICE CRESSWELL. — Your Lordships having been pleased to request that each of the Judges who heard this important case argued at the bar of your Lordships' House will give for himself an answer to the questions proposed, I proceed to do so; but having taken part in the preparation of the answers left by Baron Park^s to be read on behalf of himself and those Judges who concurred with him in opinion, and entirely agreeing in the reasoning therein fully set forth, I do not propose to waste your Lordships' time by repeating it at length in different words.

To the first question proposed I answer that Lord Alford did not become entitled to any estate. The devise is in the following terms: "To Lord Alford for and during the term of ninety-nine years if he shall so long live; remainder to trustees during the life of Lord Alford, to preserve contingent remainders; remainder to the use of the heirs male of his body." This I take to be a contingent remainder of the fourth class mentioned by Mr. Fearne, viz. "Where the person to whom the remainder is limited is not ascertained or not yet in being." And this devise was made "subject to the several provisos for the determination thereof therein-after contained." The first proviso which it is material to consider is in these words: "Provided always, and I declare my will to be, that if the said Lord Alford shall die without having acquired the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, then and in such case the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void." Now the event mentioned in this proviso must be ascertained one way or the other, either by Lord Alford's acquiring the title or dying without having acquired it, before the party to take in remainder

could be ascertained, and consequently before that party could take the estate. It was therefore a condition, or more properly speaking an event, which was to happen or fail before any estate could be taken in remainder; and if it failed, no estate was to be taken by the heir male of the body of Lord Alford. It would therefore operate, not to determine an estate already taken, but to prevent any estate from being taken; and the proviso that the use and estate limited to the heirs male of the body of Lord Alford shall cease and be absolutely void, cannot otherwise have effect than by preventing any estate from being taken.

It may be said that nothing can cease which has not commenced, and that from the use of the word "cease" we ought to infer that it was the intention of the testator to give to this proviso the effect of a condition subsequent only; and that in construing a will, the intention of the testator ought to prevail. I cannot discover that intention. The supposition that he did so intend rests, as far as I am aware, upon a conjecture that he doubted about the legality of the proviso; but this seems to be arguing in a circle. "He must have intended the proviso to operate as a condition subsequent, because he doubted its legality; and he must have doubted its legality, because he gave it the operation of a condition subsequent." It seems to me, that it may be urged, with at least equal force, that the testator was anxious that the proviso should have effect; and if he doubted its legality, he would probably wish it to be so construed as to give it some effect. But I disclaim founding * my opinion on the ground of any presumed intention of the testator, the conjecture in this case as to intention appearing extremely obscure and unsafe. Another and different ground taken for contending that this proviso should have the effect of a condition subsequent only, is, that we must look at the limitation to Lord Alford and the heirs male of his body as one entire limitation; and that as it took effect in Lord Alford's lifetime, any proviso to determine and render it void must operate by way of condition subsequent; but I cannot concur in that view of the case. The testator appears to have studiously separated the estate given to Lord Alford from the estate limited to the heirs male of his body; to the former a term for years only is given; and there can be no doubt that the intention was, that the heir male of the body should take as a purchaser. Our attention was not directed to any authority, nor have I discovered any, for construing a devise

of such distinct and separate estates to be taken in such manner, as one entire limitation ; and, in the absence of any decision, and left to the guidance of my own reason only, I have arrived at the conclusion that it cannot be so construed. This first proviso could never operate to cause the cesser or determination of the estate given to Lord Alford, but must operate, if at all, on the determination of that estate, so as to prevent the arising of the estate in remainder. There was therefore no subject matter on which it could operate as a condition subsequent. I have considered whether it would be possible to read this first proviso in connection with the sixth, or that which has been called the second equivalent proviso, so as to make the devise to Lord Alford for ninety-nine years, remainder to the heirs male of his body, with a proviso for cesser if neither Lord Alford nor Lord Brownlow during their respective lives acquired the dukedom or marquisate, in which case the limitation to the heir male of the body of

* 84 * Lord Alford would have taken effect on his death, and would not be determined till the death of Lord Brownlow. But it seems to me that the will cannot be so construed, for this would be to erase the first proviso, and the sixth is only to operate as an equivalent from the time when the title has been acquired, leaving the first proviso to have its full effect in the mean time. For these reasons I am of opinion that on the decease of Lord Alford the appellant did not become entitled to any estate in the lands devised in remainder immediately expectant on the ninety years term.

To the second question proposed by your Lordships, I answer that the appellant may become entitled to an estate in tail male on the acquisition by Lord Brownlow of the dukedom or marquisate of Bridgewater, limited as mentioned in the second equivalent proviso.

To the third, that on the decease of Lord Alford, his brother Charles Henry Egerton, the respondent, became entitled to an estate for ninety-nine years, if he shall so long live, in remainder immediately expectant on the said term for ninety years.

To the fourth, that the estate so taken is liable to be defeated on the happening of the events mentioned in the fourth proviso, viz. if the earldom of Brownlow shall descend and come to him, and he shall not have acquired or shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs

male of his body before the end of five years next after he shall have become Earl Brownlow.

To the fifth question proposed by your Lordships I answer that in my opinion none of the provisos is void. They are manifestly not impossible, although the party interested may not be able to perform them. Nor are they too remote, as possibilities upon possibilities. The distinction between the cases depending upon the old doctrine *on that subject and the present was * 85 clearly pointed out at your Lordships' bar, and I forbear wasting your Lordships' time by repeating it. It remains to be considered whether they are void for illegality. I presume that your Lordships' did not intend to ask the opinions of the Judges upon any general question of public policy, or, in other words, whether they think that the interests of the public would be better advanced by tolerating or by refusing to tolerate such provisos; but whether they are in contravention of any established law, or in contravention of the spirit although not against the letter of any law; in which case they may be said to be against the policy of the law.

In answering this question, it must ever be borne in mind, that the act to be done is a legal act, viz. the conferring of a title and dignity by the sovereign; and I will not for a moment admit the indecent supposition that the sovereign in doing that act can be influenced by any but pure and constitutional considerations; nor can I suppose, much less assume as a fact, that the advisers of the Crown will, in that capacity, be actuated by corrupt considerations rather than by those of a pure and honourable character. But it has been said, that the possession of such a fortune, and the retention of it or transmission of it to his descendants, depending upon obtaining a particular title, would have a tendency to cause the person in possession to use it in a corrupt manner, in order to attain the desired end. I think that much stress cannot be laid on the magnitude of the property, for some minds would be more affected by the prospect of losing a small sum than others by parting with millions. It would be impossible to establish one rule for the limitations of large fortunes and another for small ones. Why, then, are we to suppose that the party whose estate depends upon the acquisition of a title will use corrupt means to obtain it; are they more likely to succeed than *honourable * 86 exertions for the good of the country? Where is the evi-

dence of such a hateful fact? Am I to assume that the evil principle would in Lord Alford prevail over the good, and that he would be more prone to attempt to advance his interests by corrupt and dishonourable means than by those which are pure and honourable? Where is the authority for such an assumption? The rule in our common law courts is, that illegality is not to be presumed; why should we reverse that maxim in the present case? I find no ground for so doing. This supposed tendency to evil would apply to other matters as well as to those which are *quasi* political. Suppose a large estate left to a subject on the condition of his becoming senior wrangler at Cambridge; would it be illegal, as tending to make him employ his money in corrupting the examiners or their servants, so as to obtain an unjust advantage in the examination, or in betraying into profligacy and idleness the most promising of his competitors? I apprehend that it clearly would not; and if so, the argument based on the tendency to evil must fail. If it could be shown that illegal means would be used to obtain the title, or that the probability of their being used is so great that the testator must be taken to have contemplated and intended the use of them, I agree that the provisos would be tainted with illegality; but in the absence of any certainty or probability, and it being clear that honourable means might for aught that appears be used with at least an equal prospect of success, I know of no legal principle upon which I can say that these provisos are tainted with illegality as promoting illegal acts. The only case that I am aware of bearing on this point is that of *The Earl of Kingston v. Pierrepont*;¹ but it differs in this essential particular, that there the money claimed was bequeathed for the express purpose of being applied in

*87 * obtaining a dukedom; and it was as different from the present case as a gift to A. on condition of his obtaining holy orders, from a bequest of money to be applied in obtaining holy orders, which would no doubt be illegal.

But I have reason to believe that some, for whose opinions I have great respect, are of opinion that a man ought not to be allowed to make the devolution of his estate depend upon any act of state. I have never found any such law laid down either by text-writers or in decided cases, and I can readily imagine instances in which a decision to that effect could hardly be advantageous to the

¹ 1 Vern. 5.

state. Assume the nation involved in an expensive war, and the owner of vast estates to leave them to the public Exchequer in the event of the war still continuing at the time of his decease. I can find nothing corrupt or contrary to law in such a bequest. But it is said that the allowance of such bequests would be against public policy. I have already observed that I presume we are not asked our opinions as to public policy, but as to the law; and I apprehend that when in our law books of reports we find the expression, it is used somewhat inaccurately instead of "the policy of the law." Thus, contracts in restraint of trade have been said to be illegal as against public policy, but in truth, it is part of the common law that trade shall not be restricted, as was held in the Year Book;¹ and unreasonable contracts in restraint of trade violate the policy of that part of the common law, and are therefore illegal. So, in bankruptcy, the object and policy of the bankrupt laws is to make a rateable distribution of the bankrupt's property amongst all his creditors, and preferences given to particular creditors by a trader in contemplation of bankruptcy are in violation of the policy of the bankrupt laws, and are therefore held to be fraudulent and void. The cases depending on *ordinary *⁸⁸ wagers affecting third persons were, I think, successfully answered during the argument at your Lordships' bar; and I cannot, in the decision of the Court of Queen's Bench in *Gilbert v. Sykes*,² find any principle applicable to the present question. There it was held illegal for one man to create to himself an interest in the violent death of another, by whatever means procured. There, if the party laboured to promote his own interest, he could not do it by good means; in this case he may; and I have discussed I fear at too much length the probability of his so doing, rather than by corrupt means.

It remains to be considered whether the provisos are illegal, because they have a tendency to embarrass the Crown in the exercise of its prerogative; but I cannot imagine that there is anything more embarrassing in this case than in rival applications during life for the same office or the same title; but surely they would not be illegal. If a man, during his life, were to apply to the sovereign to grant a particular title to A., and offer in the event of its being granted to endow the party ennobled with an ample fortune, it might be very foolish and very impertinent, but

¹ 2 H. 5, pl. 26.

* 16 East, 150.

no authority has been cited to show that he would be acting either corruptly or illegally ; and yet I cannot in principle distinguish such a case from the present.

The last point to be considered with reference to the alleged illegality of the provisos is their supposed tendency to cause a subject to refuse obedience to a summons to serve the Crown as a peer of Parliament. But no such effect would be produced ; they impose the loss of the estate upon the acceptance of a particular title, and do not in any way involve a refusal to discharge a public duty. For these reasons I am of opinion that none of the provisos is void.

* 89 * 6th. It follows, if my answers to former questions are correct, that the first, third, and the equivalent provisos are to be treated as being conditions precedent.

7th. Being of opinion that the devise to the heirs male of the body of Lord Alford was made void by the first proviso, it seems to me necessarily to follow that the jointure appointed in favour of Lady Marianne Alford has ceased.

MR. JUSTICE TALFOURD.—Regarding the will of Lord Bridgewater, according to your Lordships' direction, not as containing a devise to trustees to prepare a settlement, but as in itself a devise to uses, I reply to the first question put by your Lordships, that on the decease of Lord Alford, his eldest son, the appellant, did not become entitled to any estate in the lands devised in remainder immediately expectant on the determination of the term. This question expanded for the purpose of investigation is, whether, in the absence of the event contemplated by the testator, the acquisition by Lord Alford of the title of Duke or Marquis of Bridgewater, a limitation came into existence, to be defeated by the failure of that event if it is an event legally contemplated, or to continue in spite of that failure if the purpose should be found liable to the objection suggested. The limitation “to the use of the heirs male of the body of Lord Alford,” is, with the limitations that immediately follow, made “subject to the several provisos for the determination thereof hereinafter contained”; and although other limitations are interposed before the clauses which bear the form of provisos, they are, by reference, engrafted into the limitations they qualify. In investigating each of these clauses thus associated, those who adopt the result to which I have ar-

rived must concede that the language employed to denote the non-existence of the estate is properly * applicable to the * 90 cesser of something in being ; for the introductory reference to the conditions expressed in the provisos has the words "determination thereof," and the words subsequently used in reference to the limitations are " shall cease and be absolutely void " ; but the application of these words to a subject matter to which they are not properly applicable is merely the inaccurate use of language, which, in this case, does not obscure or confuse their meaning. The primary object of the language in any view of the limitation, is to import the non-existence of the estate to which the conditions apply, the non-existence of that estate on the failure of the conditions being necessarily contemporaneous in the mind of the testator ; and, therefore, whether the words used to express this purpose be words of precedent condition, or of cesser, the principal result is the same. We shall give a large effect to such misapplication of language if we thence assign existence to an estate which can exist only that it may expire ; for words of cesser which then would, by implication, create an estate, provide at the same moment for its instant destruction. Can it be doubted that the intent of the testator was that the heirs male of Lord Alford's body should take an estate tail at their father's death, if their father had in his lifetime attained one of the dignities desired, and not else ? If this is clear, should not our construction of his words be the same as if the remainder had been expressed, "to the heirs male of the body of Lord Alford, provided he shall acquire the dignity" ? If the intent had been thus expressed, no doubt would have been suggested, and whether the condition, being possible and lawful had been unfulfilled, or being impossible or unlawful had been always incapable of lawful fulfilment, no use would arise upon the death of Lord Alford. At the moment of his demise, the condition, by whatever name it may be called, was either fulfilled or unfulfilled, the contingency at that instant was * for ever determined ; nothing * 91 that could thereafter happen could by possibility affect it ; and if, therefore, an estate vested, it could vest only to be instantly defeated ; indeed, it is impossible to describe its inception and its cesser without a contradiction in terms. It is said that estates in remainder or reversion have only artificial existences, having no entity except in the eye of the law, and that, therefore, they are

not subject to the conditions of tangible realities. They are so, but so also are estates in possession ; the lands indeed to which they apply are subject to the senses, but the estate in those lands is as impalpable to feeling or sight as a contingent remainder. Both, although invisible, and so untangible, are real, and can no more involve a contradiction as to the law of their being, than things which we behold or handle. Can an event, therefore, be a condition subsequent, or rather operate as a defeasance only, to the existence of an estate with which it is of necessity coeval ?

It is not difficult to conjecture how the inaccuracy of language which has raised this question has arisen. It was scarcely possible to introduce so much of the entire framework of the contemplated provisions into the limitations themselves as would be necessary to their perfect qualification ; to escape this inconvenience, the form of subsequent provisos was adopted, and naturally induced the employment of terms of defeasance. The words of antecedent reference to the provisos, " subject, nevertheless, to the several provisos for the determination thereof," embrace as well the provisos which prevent the existence of the contingent estates as those which defeat estates clearly created, as that of Lord Alford, on the expiration of five years after descent of the title of Earl Brownlow without his acquisition of either of the desired dignities ; and it may be observed that in the second proviso, defeating the estate of Lord Alford, the words are, " shall

thenceforth cease and be absolutely void," differing only

*92 from those in the first proviso by the *introduction of the word " thenceforth " ; but in the correspondent proviso, defeating, on a like contingency, the estate of Charles Henry Cust, the word " absolutely " is dropped, and so also in the sixth and seventh provisos, as if there had been an intention to vary the language by the omission of the word " absolutely " when an existing interest was to be defeated, which had been accidentally retained in the first clause of defeasance, but struck out in those which follow. This is, however, a minute consideration compared

th the argument to be derived from the manifest association in e testator's intent of the extension of his bounty to the issue of lord Alford, and afterwards contingently to Charles Henry Cust d his issue, with the acquisition of the dignity within his contemplation. There is no reason to suppose that, according to the nstruction contended for by the appellant, he intended the

estates to go to either of those branches of his family dissevered from the main object of his desire, if that object should be held, upon any objection of policy or impossibility, to be illegal or futile; and I cannot therefore comprehend the application of the argument, so strongly urged at the bar, that if the appellant took no estate, the conveyancer, who had framed the will with elaborate art, had failed to effect the testator's purpose. On the contrary, I think it is plain, that while the purpose was, that if the dignity could be acquired by the grandchildren of his sister, they should enjoy his estates, and that if it could not be thus united with those estates in their descendants, he designed them to go to the family of the Egertons of Tatton, according to the subsequent remainders. For these reasons, I think that the appellant took no estate in the lands devised in remainder immediately expectant on the term of ninety-nine years.

For these reasons, I am unable to answer your Lordships' second question in its terms, as an estate which never existed could neither be defeated nor revive; but I apprehend that the appellant will take an estate tail in the event of Lord Brownlow acquiring one of the desired dignities, limited as required by the sixth proviso, by shifting uses. * 93

For the same reasons, my answer to your Lordships' third question is, that on the decease of Lord Alford, his brother Charles Henry Egerton, the respondent, took an estate for the term of ninety-nine years, if he should so long live.

My reply to your Lordships' fourth question is, that the estate of the respondent Charles Henry Egerton was liable to be defeated by the happening of the events mentioned in the sixth, seventh, and eighth provisos.

In answer to the fifth question proposed by your Lordships, "Are all or any and which of the several provisos void?" I have to submit my opinion that none of the provisos is void.

The main desire of the testator, as explicitly declared in his first codicil, to unite his estates to the title of Duke or Marquis of Bridgewater in the persons of the heirs male of Earl Brownlow, can scarcely be regarded in itself as absurd or ignoble. If the acquisition by a commoner of an hereditary title is an object of generous ambition, if its desire refines the struggles of life, and its attainment ennobles their success, why should a desire to associate such a dignity with the enjoyment of great territorial possessions by

their unborn possessors be regarded as a base caprice in the dying? Is it because the interest which such a testator must take in the object of his disposition is of a more refined and abstracted character than that of an aspirant to honours which he may himself enjoy before he can transmit them to posterity, that it * 94 shall be stigmatized as vain * or idle? If it is a constitutional wish that hereditary dignities, which affect the mind with that sense of permanence and long succession which it seeks for, should be united with extensive territorial possessions, why should the adoption of this wish be censured in a disposition which contemplates the distant future, and applies to a vast estate which the testator is about to leave, and to honours which will be called into being after he has been reduced to the level of the poorest of his fellows? Or, is there absurdity in the desire, because it embraces the past as well as the future, when it includes the wish that the particular dignity which was enjoyed by his ancestors shall be revived and have pre-eminence over all other honours in the persons of their descendants? If to seek after objects out of ourselves — apart from sordid interests and personal enjoyments — is to exercise the better part of our nature, the main object of the Earl of Bridgewater was not ignoble.

But it is contended that admitting that object to be in itself lawful, the proposal for its attainment as a condition to the enjoyment of an estate, according to the peculiar limitation of the will, ought not to receive legal sanction, because it is impossible, or, if possible, involves a possibility too remote, or contravenes public policy as inviting the use of corrupt means or the violation of public duty, or tends to embarrass the Crown in the distribution of dignities. Although some of these objections have a specious appearance, I think, on examination, all will prove to be founded on fallacies.

1. It is true that in one sense the attainment of the object proposed is impossible; that is to say, that the party impelled by the condition to seek it cannot command it by any effort of his own; but the impossibility which makes a condition void is that which exists in the nature of things, not an inability in the devisee * 95 to perform it. If this were * otherwise, every devise conditioned on an event dependent on the will of others — as on the grant of the royal license to bear a prescribed name and arms — must either be absolute, discharged of the condition, or be void, according as the condition may be framed to defeat the

estate or to prevent its arising. It is true that, in devising an estate conditionally on an acquisition which is beyond the power of the devisee to secure, a testator may exhibit a vexatious caprice ; but while our law maintains for every man the irresponsible power of disposing of the whole of his absolute property according to his pleasure, subject only to the restriction on perpetuity and the laws of mortmain, such caprice will no more form an objection to an absurd condition than to an absurd devise. If the abuse of this power shall be found to work more mischief than its exercise produces good, it should be qualified by the Legislature ; but the only limit which at present bounds the most capricious freedom of disposition is incidentally derived from the evidence which fantastical devises or bequests may afford of the mental incapacity of the testator. The law which invested Lord Bridgewater with the power to devise all his property to the issue of Lord Alford, or to the issue of Charles Henry Cust, or to the family of Egerton, equally enabled him to render the estate of any one of these branches in preference to the others dependent on events wholly fortuitous or determinable on the pleasure of the Crown.

2. The objection that a possibility cannot be superadded to a possibility,— which, as applicable to this case, means that a condition cannot embrace two contingent events,— seems derived from a misconception of dicta to be found among our authorities. It was rather suggested than urged in argument, and when expressed in intelligible language, is obviously inconsistent with the most familiar examples.

*3. But the principal force of the reasoning on behalf of * 96 the appellant has been directed to show that the provisos are contrary to public policy, because they tend to induce the employment of unworthy means in order to the attainment of the dignity essential to the estate ; that they may embarrass a peer in the discharge of his public duties, and the Crown in the determination to withhold or to bestow honours. The contravention of "public policy" is a term of dangerous, because uncertain, use in the ascertainment of legal rights ; but it is true that if the object proposed by the testator were in its nature capable only of attainment by the violation of any law of God or man, or if he had prescribed or suggested such violation of morals or law, his condition or proviso would be void. But if his object only partakes the common quality of the objects of worldly ambition, that it may be

sought either by base conduct or by generous exertion, can its possible operation to mislead an imperfect nature render the proposal vicious? The acquisition of a certain amount of property, a marriage with a nominated party, or a seat in the House of Commons, may be sought by evil means; but is it to be assumed, contrary to the ordinary presumption of law, that evil means will be employed? If it is a legitimate assumption in legal argument that a peerage is attainable by the corrupt use of political influence corruptly obtained, it will be further necessary to the conclusion, to maintain that the employment of such means is contemplated in the proposal of the dignity. The cases in which it is alleged that the potency of temptation has rendered acts or bargains illegal, — as in the disqualification of Judges to decide on questions in which they have an interest, and in the avoidance of wagers, — are governed by other principles. The maxim "that no man shall be a judge in his own cause" is founded on the palpable

*97 *inconsistency between the situations of party and judge, which must prevent the decisions of any one uniting both characters from being satisfactory, even though they should be perfectly just; and the invalidity of wagers, with the exception of some extreme cases, will be found to rest on the injustice of subjecting the interests, and the feelings of third parties to a public scrutiny. It is scarcely just to affirm that the proposal of a great inducement to obtain a peerage necessarily places the aspirant in a position in which his interest conflicts with his duty, for it may be that the course obviously open before him is through great public services; but if such opposition may be assumed, does it necessarily follow that the result will be evil, when every thing which is great and excellent in human actions springs out of conflicts between interest and duty?

The objection that the Crown may be embarrassed in the grant of honours by such conditions as the provisos express, is on the fallacious assumption that the Crown is liable to be embarrassed by the acts of its subjects. If embarrassment should arise to the Crown, it can only arise because its advisers have embarrassed it by regarding the collateral effects with the act of a stranger has associated its bounty, but with whom it has no proper concern. It has only to hold the even of its course, giving or withholding the dignity as though it were had no existence, and no embarrassment can arise in

the due execution of that high public trust which it fulfils when it dispenses honours.

To your Lordships' sixth question I answer for the reasons already given, that the first proviso, by which, according to the construction submitted, the limitation to the heirs male of Lord Alford is prevented from arising, is a condition precedent; and that the second proviso, defeating Lord Alford's estate on the lapse of five years from * the descent on him of the earl- * 98 dom of Brownlow without acquiring the title of Duke or Marquis of Bridgewater, is a condition subsequent, or rather a defeasance by which a subsisting estate is defeated.

To the seventh question of your Lordships I answer, that the jointure of the Lady Marianne Egerton cannot be maintained, failing with the failure of the estate on which it is charged.

MR. BARON PLATT.—[His Lordship here stated the facts, as set forth in the printed papers, and then proceeded thus : —]

The consideration of any of the limitations in the will, prior to that of Lord Alford and the term of ninety years, becomes therefore unnecessary.

Had the testator devised to Lord Alford for ninety-nine years, if he should so long live, remainder to the heirs male of his body, if he should acquire by creation or inheritance a particular title of honour, the remainder would undoubtedly have been contingent; and until the two events had happened, the estate in remainder would not vest. But does the will contain any such devise? I think it does not. The testator appears to me to have designed, as regards Lord Alford and his heirs, and Charles Henry Cust and his heirs, one course of succession, and to have intended that such course of succession should be liable to be interrupted and defeated during Lord Alford's life, if he survived Lord Brownlow five years, and after his death, in default of his having acquired the title of Duke or Marquis of Bridgewater. The will is evidently penned by the hand of a master of his art, who in the proviso has selected terms appropriate to defeating an estate already vested, but inappropriate to the prevention of its vesting. Upon what legitimate principle can a proviso for cesser, thus advisedly * introduced, be converted into a condition prece- * 99 dent? I think it cannot be so converted; and in answer to the questions, firstly, secondly, thirdly, fourthly, and sixthly pro-

posed by your Lordships, say, that, in my judgment, on the ~~decease~~ of Lord Alford the appellant became entitled to an estate in ~~tail~~ male in the lands devised in remainder immediately expectant on the ninety-nine years' term; and for the reasons assigned in ~~my~~ answer to the fifth question, that such estate was not liable to be defeated; and that, on the decease of Lord Alford, Charles Henry Egerton, the respondent, did not become entitled to any estate in remainder expectant on the said term.

To the fifth question, I answer that, in my judgment, all the provisos involving the acquisition of the dignity of Duke or Marquis of Bridgewater are void, as against public policy. Taken in connection with the limitations, which they were introduced to defeat, can it be doubted that they present a direct and powerful temptation to the exercise of corrupt means of obtaining the particular dignities? It is no answer to say, that at the present day such temptation would be resisted, and the exercise of such means impossible. The assumption of the purity of a particular period avoids the question, which to a certain extent is of an abstract character, and entirely independent of circumstances, incapable of general application. The question is altogether independent of the purity or venality of any particular period of our history. Is such a temptation imaginary? The case of *The Earl of Kingston v. Lady Elizabeth Pierrepont*¹ shows the reverse.

In that case Gervase Pierrepont had devised by his will 10,000*l.* to procure by the best and becoming lawful means a dukedom to the head of his family, so that it should be procured with-
* 100 in one year after his decease; and the Earl * of Kingston, after the testator's death, ventured to file a bill to enforce the application of the money accordingly. On a demurrer to that bill judgment was given against him, one of the grounds of the judgment being the illegality of acquiring a title of honour for money. The insurance of a mariner's wages is illegal and void, on the ground of the temptation which such an insurance would hold out to him to desert his duty.

I have to express my regret that the duties and distraction of a circuit, and my absence from London, concur to prevent my enlarging upon the principle on which the provisos appear to me to be illegal and void, or citing the various authorities in support and illustration of it.

¹ 1 Vern. 5.

To the seventh question I answer, that, considering as I do the provisos to be conditions subsequent and void, I am of opinion, that in the events which have happened, the jointure appointed in favour of Lady Marianne Alford has not ceased.

MR. JUSTICE WIGHTMAN and **MR. JUSTICE ERLE**. — As we are at this time fully occupied upon the Northern circuit, we hope that your Lordships will permit the opinion, which will be read as that of **Mr. Baron Parke**, to be read as expressing our opinion also, and the reasons for that opinion.

It was, in substance, the result of a meeting of several of the Judges, and was much considered by us when reduced into writing, and certain alterations in it were made at our suggestion.

A separate statement of our opinions, with the reasons, would only be a mere repetition of the opinion and reasons to which we have begged leave to refer, and which we propose, with your Lordships' permission, to have read as our own.

* **MR. BARON ALDERSON**. — In answering the seven ques- * 101 tions which your Lordships have proposed to her Majesty's Judges, I shall not take each question separately ; but, inasmuch as, in my view of the case, two points, if settled, will enable me to answer all those questions, I shall examine this will in detail, and state those reasons which have occurred to me, and on which my opinion is founded.

The rule on which we are to proceed is clear ; namely, that we ought, so far as may be consistent with law, to give full effect to the intention of the testator, as embodied in the words which he has used.

Here the testator, after certain devises, which are undoubted, and which by the events which have occurred are now removed out of the case, devises his estate to trustees for a term. [His Lordship here stated the will and the first proviso.] The same provisos are then extended to the devises to Colonel Cust and the heirs male of his body.

I do not think it material to advert to any other of the provisos, except that by which it is provided, that if Lord Brownlow should be created Duke or Marquis of Bridgewater with particular limitations, that such creation shall thenceforth be equivalent to the acquisition of the title by Lord Alford or Colonel Cust, notwithstanding the previous determination, if it shall happen, of the uses

or estates limited to them, or either of them, and the heirs **male** of their respective bodies.

The other three provisos, in addition to the above, have not any material bearing on the questions which have been proposed, unless your Lordships should hold that the invalidity of any one of them will vitiate the whole.

My opinion, however, very clearly is, that the validity of * 102 each is to be considered separately, and that those which * are

valid will have effect, even though the others should be deemed invalid. The principle in all these questions is, as is laid down in our books, that where a testator involves in one and the same set of words several contingencies, some legal and others illegal, all are void, if any one is so; because you cannot say whether he meant more than one contingency, nor say whether that was the legal or illegal contingency which he intended; but where he expresses separately and distinctly each contingency, it is clear that he intends not one only, but all of them, and then the Court rejects the illegal and carries the legal wishes into effect. Here the testator has done the latter, and the provisos are therefore to be treated as separate.

If, therefore, any of them were doubtful,—which, however, is not my view of any of them,—I should still remain of opinion that if those to which I have referred are legal, the question ought to receive the same answer.

But it is first to be considered, whether the proviso which is the first, and which has, in fact, happened, prevents the appellant, the heir male of the body of Lord Alford, from taking the estate; in which case it would operate as a condition precedent, and, whether legal or illegal, would equally prevent him from taking the estate at all; or whether it operates as a condition subsequent, so as to cause an estate previously existing in him to cease and become void; in which case its illegality would become material.

And I am of opinion, that if we are to construe these as mere limitations at common law contained in a will, we must hold this to be in the nature of a condition precedent.

The estate is at first limited to Lord Alford for life, with remainder to the heirs male of his body, and, taken in connection with the proviso, it is, subject to the contingency that they, * 103 when they become the heirs male of his body, * shall be also heirs male to the body of a person having the title of

Marquis of Bridgewater, or heirs apparent to Earl Brownlow, if he, in Lord Alford's lifetime, shall have been elevated to that title. This contingency must occur at the death of Lord Alford, for till then they are not heirs male: *Nemo est hæres viventis*. At the time then when first they can take the estate, the failure of the contingency deprives them of it. The nature of the limitation itself therefore shows that the words "cease and be void" cannot have their exact literal effect, for it would be absurd to give and take away the estate at the same moment of time. In such a case the person cannot be said to take at all. Therefore, I think, that under this will Lord Alford took an estate for ninety-nine years in case he should so long live, which estate, on a certain contingency, was to cease; and there the words of the proviso have a full effect; and that the present appellant took a contingent remainder, and therefore (the contingency having happened adversely to his claim) took nothing at the death of Lord Alford. And as it is a rule of construction to give words, if they will bear it, the effect of creating a contingent remainder, rather than an executory devise, when there is, as here, an estate to support it, this is the construction which, treating these as limitations at common law contained in a will, I should give to them. But perhaps your Lordships will pardon me if I venture to suggest a doubt whether they ought to be so treated by your Lordships sitting here in an appeal from a decree of a Court of Equity. Here the scheme of the will seems to be, that the testator has created an executory trust, and your Lordships are called upon to say how this is to be carried into effect by a settlement so framed as to embody, if possible, the whole intention and object of the testator. This, therefore, is really a question for a Court of Equity, assisted by and acting according to the * course of practice of conveyancers *104 of eminence, rather than for the Judges of the Courts of Common Law. And in doing this perhaps your Lordships may think that the words "cease and be absolutely void" are such clear indications of an intention, that in some manner the estate given to the present claimant shall vest before it ceases, that it may induce you to give to the words "heirs male of the body," in the original course of descent directed by the will, a modified construction, and to direct the settlement to be so framed as to give literal and full effect to the words "cease and be absolutely void," which it must be allowed are very strong words, indicative

of an intention on the part of the testator that in some way or other they should first take the estate, and on the contingency occurring lose that which they had before taken. And in such a case the words of the proviso would require to be treated as a condition subsequent.

But your Lordships have also asked whether the conditions, whether precedent or subsequent, are legal; and as I think they are, this point which I have thought it right to suggest for your consideration will not, in my opinion, affect the true results of this case.

The general object of the testator, by which it seems clear we ought to construe these provisos in the will, is stated by himself in the first codicil. He says: "My object is to unite my estates to the title of Duke or Marquis of Bridgewater, according to certain limitations, if it shall be the pleasure of the Crown to create such title, so as to come to the heirs male of John Earl Brownlow and Sophia his wife." This is his declared object in the framing his devises in favour of the family of Earl Brownlow; and if this object cannot be carried into effect, the intention of the testator then

clearly is to give his estates without any such limitations to *105 the family of Egerton in succession. This * is, as it seems to me, the key to the whole of these provisos. He chooses that his estates shall go to a noble family, if the head of that family should bear the title of Bridgewater, and be called by that title; but, inasmuch as that family was already in possession of an earldom, it was necessary, in order that the person, a member of that family in the male direct line, who might succeed to the estate, should, either in his own right, or notwithstanding his succession to the title of Earl Brownlow, be sure to bear in society the title of Bridgewater, and that the newly created title should be a marquise or dukedom, for the new creation of the title of Baron, Viscount, or Earl of Bridgewater would have no such effect. If this could not be done, he wished his estates to go to the Egerton family. Now, if we consider this, it really is, as it seems to me, very little different from the not unusual wish of a testator (to which no one, as I believe, has ever objected), that the inheritor of his estate should, from the grace and favour of the Crown, obtain leave to bear the name and arms of the testator himself. The accidental circumstance of the earldom of the head of the family out of which the taker of the estate was to come has neces-

sitated the alteration in the terms of the lease. It is not otherwise is only if (that is to say in the opinion of the law) in the right and favour of the Crown. The law ~~permits~~ ^{permits} such a change. In the change of ~~case and time~~ ^{case and time} I depend on the law and favour of the Crown. The reason is a simple one. I depend solely on the grace and favour of the Crown. The law may be greater in ~~the case of the plaintiff~~ ^{the case of the plaintiff} more or less, and both depend on the will of the same plaintiff. And both, as I believe, though some ~~error~~ ^{error} there is in the point, equally require the ~~word~~ ^{word} of the Queen in the case and favour of the Crown. ~~is confirmed in law~~

*But it is said that these ~~principles~~ ^{principles} are legal and that "I" may lead to public evil or inconvenience. This is true. They are contrary to what is called public policy. I think this is a very grave and important question. If public policy is meant the object and policy of a particular law. Then I readily admit it as a rule, for it is a very ~~resounding~~ ^{resounding} motto of ~~settling~~ ^{settling} a particular law to look at the object which will be the cause of the evil it was apparently intended to remove. Again if a person be either illegal or impossible, so far as it is that. But here it seems to be contended that an act possible and legal but in the opinion of sensible men not expedient to be done is for that reason to be void as contrary to public policy. Now I think that this which is really what is here meant, would altogether destroy the sound and true distinction between judicial and legislative functions: and I pray your Lordships to pause before you establish such a precedent as that. By this public policy will be meant the prevailing opinion, from time to time, of wise men (and in saying "of wise men" I give a favourable view of the principle) as to what is for the public good, — an excellent principle, no doubt, for legislators to adopt, but a most dangerous one for Judges. It is notorious that this would introduce an ever-shifting principle of decision, and that no case hereafter could be ever determined upon precedents, if it was to be adopted. A lease carefully drawn according to understood rules may be set aside as contrary to the policy of free trade, or a promise or contract between man and man set aside, because, not its intention or object, but its possible tendency may, in the opinion of the day, lead to inconvenience. Why should such contracts be, as they constantly are, — such as contracts with parish officers to supply goods to the parish workhouse,

— actually prohibited, if their tendency without such prohibition makes them void? It is impossible to *foresee where such a principle will stop. I shall not venture to take this, therefore, for my guide, nor go into political theories or instances from the history of our own country to decide on the validity of the Earl of Bridgewater's will. My duty is as a Judge to be governed by fixed rules and settled precedents.

But what are the cases cited, and what is the true principle to be found in them? I propose to examine the first, that I may ascertain as well as I can the second. The first case, as being nearest to the present, is that of *The Earl of Kingston v. Pierrepont*;¹ but there, by the will, a sum of money was expressly left for procuring, by all lawful means, the peerage. Now there are no lawful means of so procuring it; for it is, says the reporter, illegal to acquire honour for money; so that the devise was for an impossible purpose. And there, too, it was the very object — not the mere tendency, or supposed tendency — of the devise; and for that reason the devise was void. If the Earl of Bridgewater, now, had devised these estates expressly that their proceeds might be used to procure the marquisate, this case would have been decisive to show that the devise was void; but this is a totally different case. Then comes the case of the bastard child, where the agreement for payment of a sum once for all to churchwardens and overseers by the putative father was held to be illegal. But the true principle on which that case was decided was that to which I alluded before, that the policy of a law is to be looked at in construing it. The Bastardy Acts direct that the putative father shall indemnify the parish. "Indemnify" does not mean that the parish shall make a profit, but shall be saved from loss. Now the

parish was to be indemnified only, and that because probably the Legislature contemplated those evils *which Lord Ellenborough and the other Judges so correctly point out. They decided, and gave as their reasons for holding the parish officers to a mere indemnity, those arguments of policy which induced, as they thought (and no doubt correctly), the Legislature to make the law. They used the policy of a particular law as a key to open its construction; and they did rightly. But that case is no authority for construing a man's act by disputable notions of an expedient or inexpedient policy, which is the case here.

¹ 1 Vern. 5.

Next comes the class of cases arising out of wagers, which, in terms, approach more nearly, but, when properly considered, are not at all applicable (because their determination depends on very peculiar grounds) to the present case. Wagers are like the *sponsiones judicis* of the Roman law ; they are made between parties both of whom are volunteers, and they are not part of the disputes arising in the course of the common business of human life. Now the Courts of Law are not provided at the public expense, and were not intended by those who so provided them, for the settlement of any but differences which do arise in the ordinary course of business ; and it is not at all wonderful, therefore, that disputes arising out of wagers, if tried at all, should be put under more stringent restraints than other disputes ; and we find that it is so. Many wagers are illegal which as conditions would be legal. For instance, a wager as to the duration of her Majesty's life would be held illegal ; but no one would object to the making a lease for lives in which her Majesty's life should be one. So, again, a wager that a son would be born within a twelvemonth after the marriage of A. and B. would be illegal ; but a sum of money or an estate left to the first son of that marriage if born within a year of the nuptials, would not be a void bequest or devise. The *cases of wagers are governed by special rules ; and no doubt it has been laid down that wagers raising an indecent issue, or one with a Judge or juryman as to the result of a cause, or one with a voter as to the result of an election, or as to the probable amount of the revenue, or as to the duration of the life of a foreign prince at war with this country, have been held illegal, as contrary to public policy. In the last case, that of *Gilbert v. Sykes*,¹ this was pushed to a great length, almost amounting to the ridiculous, when it was gravely put that it might induce the reverend plaintiff there to commit high treason, by protecting the life of Napoleon in case of invasion, or induce Sir Mark Sykes, the defendant, to try to put an end to his payment by the assassination of that prince. But even in that case it would have been difficult if the defendant had really sold to the plaintiff an annuity for the life of Napoleon, to have argued that it was a void transaction ; and yet the imagined tendency would have been precisely the same in both cases. The truth is, that an active imagination may find a bad tendency arising out of every transaction between

¹ 16 East, 150.

imperfect mortals ; and to use this as a criterion for determination, would make every case depend on the arbitrary caprice of an acute Judge.

The principle, then, to be extracted from all this, seems to me to be, that in all the ordinary transactions of business or contract in human life, if the object expressed be impossible or illegal, the condition is void ; and that if it be physically possible, but impossible except by doing an illegal act, it is void also. But that the mere tendency, on some remote and not very probable supposition, that what is not expressed to be the object may, nevertheless, possibly be considered to be the object, will not make the condition void.

* 110 * Is, then, this in the ordinary course of the business of human life ? The fact that the Legislature passed a statute enabling a man to make a will of lands surely proves most abundantly that it was considered his business and his duty to do so ; and as no restrictions were imposed, except as to the form of doing it, it must be taken that the Legislature meant him to do it freely and according to his own wish. It was probably thought that this power would conduce to the public good by making men prudent and active in acquiring an estate which they were permitted to devise freely after their death. To make a will of lands is, then, surely part of the ordinary business of human life ; it is not a capricious or wanton act, like a mere wager.

Then it falls within those rules which govern such acts. I can find no ground for saying that it is illegal to leave land to a man on condition that on him the free grace and favour of the Crown, the proper rewarder of merit, shall be poured out. To me it seems quite as reasonable to consider it as an incentive to well-doing and to patriotic daring. Why am I, when it may be rightly and honourably obtained, to impute the intention of dishonour to the devisee, or of corruption to the Crown or its ministers ?

For these reasons, I think this condition legal ; and, indeed, as all the conditions are based on the same free grace and favour of the Crown, though there may be some distinctions taken and some difficulties raised as to one of them, I think all are legal.

I have now stated my reasons, and have to apologize to your Lordships for their imperfection, which has, I hope I may remind

your Lordships, almost necessarily arisen from my other avocations on the late circuit, by which I have been very fully occupied almost ever since the argument at the bar. I answer, therefore, your Lordships' seven questions as follows : —

* 1st. On the decease of Lord Alford, I am of opinion * 111 that the appellant took no estate.

2d. His estate may revive if Lord Brownlow is created Marquis or Duke of Bridgewater, with the special limitations mentioned in the will.

3d. On the decease of Lord Alford, his brother took an estate for ninety years, if he should so long live, with contingent remainder to the heirs male of his body : but

4th. Subject to be defeated both as to the estate to him and his heirs, exactly in the same manner as that to Lord Alford was liable to be defeated, and to revive again, as in my answer to the second question.

5th. I think all the provisos valid and also separable, and, in particular, that the proviso which has defeated the appellant's estate is valid.

6th. I think, but subject to the difficulty which I have ventured to state to your Lordships, that the provisos are to be treated as conditions precedent to the vesting of the estate in the appellant and to the vesting of the estate in the heirs male of Charles H. Egerton, but that they are to be treated as conditions subsequent to the estates for life of Lord Alford and that of Charles H. Egerton.

7th. I think that Lady Marianne Alford's jointure, depending on the estate vesting in the appellant, has ceased.

MR. JUSTICE COLERIDGE. — My Lords, your Lordships' first question is, whether, on the decease of Lord Alford, the appellant became entitled to any and what estate in the lands devised in remainder immediately expectant on the ninety-nine years' term ; and to this I answer, that, considering it under the conditions which your Lordships lay down, I think he did not. I regret that I have been compelled to form my opinion merely upon the argument and upon general principles, * without * 112 having been able to examine the authorities which bear on the question. I feel that this makes me more than commonly liable to error in the conclusion to which I have come ; it is there-

fore a great relief to me to know that I shall be corrected, if necessary, by those, who, for many reasons, have more ground for speaking with authority on the new and somewhat difficult subjects under discussion.

By the limitation under which Lord Alford took, an estate for ninety-nine years was devised to him if he should so long live, remainder to trustees to preserve contingent remainders, remainder to the use of the heirs male of his body. This last was clearly a contingent remainder; but upon this the testator engrafted a proviso in these terms:— [His Lordship read it.] The gift and the proviso upon the gift must be taken together,— both are parts of one whole, the latter introducing a qualification into the former; and so taken, the import is this: “I give to the heirs male of Lord Alford’s body an estate, to vest upon his death, if in his lifetime he shall have become Duke or Marquis of Bridgewater, otherwise not.” No great stress was laid in the argument, and very properly, on the use of the word “cease.” The last clause shows what was intended by this:— in the event supposed, the limitations over are to take effect as if Lord Alford had died without issue male. Lord Alford has died without becoming Duke or Marquis; he has in fact left issue male; the appellant is his eldest son; but the limitations over are now to take effect as if there had been no issue male, because he has not become Duke or Marquis of Bridgewater. The event upon which the contingent remainder was to vest happens under such circumstances that it never can vest; the estate, therefore, cannot be said to cease, because it never has commenced.

If this were the whole will, I suppose it would not be seriously contended that any thing in the shape of estate or interest had existed in the present appellant during Lord Alford’s lifetime which could be properly said to cease or be determined by his not having become Duke or Marquis, assuming that to have been a condition effectually imposed. But it is contended that the whole will is to be taken together; that all the limitations are to be considered as forming one entire whole; and because the prior limitations have taken effect, therefore the limitation in question, though contingent, has been in some way brought into existence; consequently, that whatever is to make it void is in the nature of a condition subsequent. It is very difficult to state this proposition in definite language; to say what it is which the appellee

lant is to be supposed to have had in him during Lord Alford's lifetime capable of being determined. If it be not use, or estate, nor interest, how is a Court of Law to take notice of it? The testator has provided only for the determination of "a use, or estate"; and if it be neither, it seems not to be at all within the scope or provisions of the will. Nor am I able to see why the vesting of estates under prior limitations should at all affect the construction of a proviso which applies only to this contingent remainder; especially when it is remembered that the testator has not left his intention in doubt, or to depend upon any implication of law, as he expressly excludes a limitation "to first and other sons," and directs that it shall be "to the heirs male," because it is his intention that the vesting should be suspended during the life of Lord Alford. It would be, therefore, clearly a violation of the testator's will to hold that the appellant had any thing vested in him during Lord Alford's life; and if he had not, then no estate could vest in him on his death, because that death came attended with a circumstance which prevented it from arising at all as effectually as if the appellant had died an instant before * him. This cannot be better stated, as it seems to me, * 114 than it has been in the Lord Chancellor's judgment in the Court below, which I entirely adopt.

To the second question of your Lordships I answer, that the estate in the appellant, which at present is prevented from arising, may still arise, in the event of the present Lord Brownlow being created Duke or Marquis of Bridgewater, with the title and dignity limited as required by the proviso in the will in that behalf.

To the third and fourth questions I answer, that on the demise of Lord Alford, the respondent Charles Henry Egerton became entitled to an estate for ninety-nine years, if he should so long live; which estate will be defeated in case the earldom of Brownlow should descend and come to him, and he shall not have acquired, or shall not acquire, the title and dignity of Duke or Marquis of Bridgewater, to him and the heirs male of his body, before the end of five years next after he shall become Earl Brownlow.

5th. Your Lordships' fifth question is, — whether all, or any, and which of the several provisos are void? And to this I answer, that in my opinion those provisos are valid which merely

point to the acquisition of title or dignity in the peerage ; those are void which seek to restrain from acceptance of it. The distinction between the two is obvious ; the former points to the exercise of its prerogative by the Crown, — the latter to the act of the subject ; and supposing an intention in the Crown to require the service of the subject in a particular rank and under a particular title, make it the interest of such subject to refuse obedience. We cannot, constitutionally, suppose misconduct or the temptation to misconduct in the sovereign as the ground of a judicial decision ; it is, if I may so express myself without disre-

spect, the duty of the sovereign to confer the peerage

*115 as the reward of merit, or the incitement to great * and good actions, or for the public benefit, as a mode of placing the individual in a better position to render public service. To suppose then that the sovereign will be at all influenced by any other motives in the exercise of this most important prerogative is indecent, and in a legal sense unreasonable. If then I make the gift of an estate, or the possession of it, to depend on the acquisition of a peerage, I merely make it depend on the individual's being or becoming worthy of it, or fortunate enough in his opportunities to attract the attention and merit the highest reward or encouragement which the Crown can bestow. If a father should by will devise an estate, or bequeath a sum of money to a particular son, in case he were made a judge or a bishop within a certain time, it would be strange to say that by so doing he attempted in any way to interfere with the exercise of the prerogative of the Crown : or that he was doing any thing more than giving such son an additional and not unlawful motive for labouring so to conduct himself as to become fitted for either of those high offices. What is true of the office of judge or mission of a bishop seems to me equally true of the dignity of the peerage. All three are conferred by the same high authority, in the discharge of the same public duty, influenced only, it must be presumed, by the same high motive. This part of the case was argued with much earnestness, greatly laboured, and authorities were very industriously collected, — and the few observations which I have made may seem to dispose of it very summarily ; but I confess it seemed to me that an error lay at the root of the whole argument, fatal to it, — the supposition that the Crown would or could be in any way influenced or embarrassed in conferring a peerage by such a proviso in the will of

a subject. Unless this be supposed, the argument is worth nothing ; and to suppose it would be highly improper.

* I give this part of my answer with considerable confidence. In regard to what follows I am bound to express more doubt. If the only mode of creating a peer by writ of summons, and the proviso in plain terms made it the interest of a subject to disobey any such writ, unless it were couched in particular terms, I think it would be quite clear that such proviso would be illegal and void for the purpose of determining a valid estate ; because it is the unquestionable duty of the subject to obey the command of the sovereign, which calls on him to render service in that rank of the peerage and by that title named in the writ. The sovereign is to judge — and is alone to judge — what rank and what title it is best on public grounds for the individual to act on and bear ; the subject is equally bound to obey in these respects as he is in respect of the peerage itself. But it has been questioned whether these principles apply to a peerage by patent ; and on a subject so remote from a lawyer's common studies, it would be presumptuous in me to speak under any, and especially under my present circumstances, with confidence ; but on principle it seems to me that for the present purpose writ and patent are but the form in which the sovereign exercises the prerogative ; in substance each is equally a command, and the duty of obedience is the same in regard to each. If the subject may lawfully refuse one rank or one title, he may in turn refuse any other rank or title ; in other words, he may lawfully refuse to become a peer by patent, — though the patent be issued, — and this, I think, cannot be maintained. If then to do this would be a breach of the duty which a subject owes to the Crown, the proviso which makes it his interest to be guilty of this breach must be void.

6th. From what I have stated in answer to the first question, it follows that I think the acquisition of the dukedom or marquise of Bridgewater, with the specified * limitations over, by Lord Alford, is to be treated as a condition precedent to the vesting of the remainders in the heirs male of his body ; and I am of the same opinion as to the acquisition by Charles Henry Cust of one or other of the said titles in regard to the limitation over to the heirs male of his body. Probably it is sufficient thus far to answer this question.

7th. I am of opinion that, in the events which have happened, the jointure appointed in favour of Lady Marianne Alford has ceased. There is no one of your Lordships' questions in respect to which I have been more desirous of time, and the opportunity of examining books, than in respect of this; and in consequence I answer this question with considerable doubt. The testator declares his will to be, that if the use or estate limited to the heirs male of the body of Lord Alford shall be determined and made void by virtue or according to any of the provisos for that purpose in his will, any jointure to be made or covenanted to be made by him as aforesaid shall thenceforth cease and be void. His intention is clear,—that if the limitation over to the heirs male of the body fails in consequence of Lord Alford's failing to become duke or marquis, the jointure shall fail also. He has expressed the first part here by the words "determined and made void," and that has not literally happened; but I think I am bound to put the same interpretation on these words as I have done on the equivalent words in the statement of the proviso itself in the earlier part of the will; and even if I do not, still, as I think the condition itself a valid one so as to devest an estate vested, this is immaterial. The event then having happened, is not the jointure either prevented from taking effect, or determined if it has taken effect? Lady Marianne Alford may be a purchaser; but still the question

is, on what terms has she become so? The donor of the
* 118 power * seems to me to have imposed the terms, either pre-
cedent or subsequent, it matters not which, that the jointure shall not arise, or shall cease if it have taken effect, sup-
posing Lord Alford so to fail in acquiring the title, that the limitation over to the heirs male of his body does not arise.

MR. BARON PARKE.—Seven questions are proposed by your Lordships, in answering which we are to assume the facts stated in the printed cases to be correctly stated, and the will as not containing merely a devise to trustees to prepare a settlement, but as itself being a devise to uses. [His Lordship stated the date of the will and the facts of the case.]

Under these circumstances it is not necessary to consider any limitations in the will prior to that to Lord Alford, and the term of ninety-nine years; and to the first question proposed by your

Lordships I answer, that on the decease of Lord Alford, his eldest son, the appellant, did not become entitled to any estate in the lands devised in remainder immediately expectant on the ninety-nine years' term.

The estate was devised to Lord Alford for ninety-nine years, if he should so long live; remainder to the use of trustees and their heirs during the life of Lord Alford, in trust to preserve contingent remainders; remainder to the heirs male of his body. This was clearly a contingent remainder. If there had been a devise to Lord Alford for ninety-nine years if he should so long live, remainder to trustees, &c., remainder to the heirs of his body, if Lord Alford should acquire by creation or inheritance a particular title, it would have been clearly a contingent remainder. In the first case, one event was to happen, viz. an heir male of the body to be in existence at the *termination of the particular estate. In the other case, two events must occur,—the ascertaining of the party to take as heir of the body, and the acquisition of the specified title. Both must happen before the estate could vest: both are therefore contingencies precedent to the appellant acquiring any interest; unless they occurred, he could take nothing; or in ordinary, though not correct language, both are conditions precedent. But the language of the will in the part where the acquisition of a title is rendered necessary is in the shape of a proviso. It is to this effect, reading it as containing limitations to uses: "Provided always, that if the said Viscount Alford shall die without having acquired the title of Duke, &c. to him and the heirs male of his body, then and in such case the use and estate hereinbefore limited to the heirs male of his body shall cease and be absolutely void." The estate or use limited to the heirs male of the body did not exist or arise until the death of Lord Alford,—and it could not cease and be void until it existed; and the proviso as to cesser can only operate in this particular case as a declaration of the contingency, upon the happening or non-happening of which the estate is to vest. Whatever language is used, the meaning is the same. It is clear that it was intended that a certain event should happen before an estate or interest should exist or arise; and the form of expression used cannot make it what it really is not, an event to defeat an estate or interest already existing. In words, if the contingency does not happen, the use and the estate ceases and is void; but it is in

words merely, for in reality no use arises or could take effect unless the event happened, on the happening of which it was to take effect. With respect to those limitations in which the use actually has arisen and the estate has vested, it operates as a defeasance, or in common language, a condition subsequent.

* 120 * With respect to uses which have not yet arisen and estates which have not vested, and which cannot, therefore, cease, the proviso, to have any operation, must be construed to create a contingency which is to happen before, or in common parlance, a condition precedent to their coming into esse, or existing.

If the appellant were proceeding at law to recover his estate in an ejectment, and there were special pleadings in that form of action, he would have had to state in his declaration the happening of both events, pursuant to the rule which requires all precedent conditions to be stated by the petitioner, all conditions subsequent which cause the estate to cease to be pleaded by the defendant. It may indeed happen, that the form of the deed giving a benefit, and then defeating it in a particular case by matter contained in a proviso, may throw the burden of pleading in such a case and proof of the non-happening of the event on the other side; but the course of pleading would not alter the nature of the event: it would be still one on the happening of which the plaintiff's title would take effect, and not otherwise, and on the non-happening of which it would not take effect at all. It would not be a contingency on which an estate already gained were lost; this distinction is important only when the contingency is illegal or impossible. Supposing it to be illegal, if it be a contingency or condition precedent, and the event does not happen, or if it be impossible, and therefore cannot happen, the party never obtains the estate; if it be a condition subsequent, he never loses what he has got. The law will not allow an estate or interest actually vested to be devested on an illegal condition; and an impossible condition cannot be performed. It is quite clear, in this case, in consequence of the event not happening on which his right to the estate de-

* 121 pends, that he does not get it,—he * gains nothing; it is not a condition or contingency to make him lose what he had got. I take it to be quite clear, therefore, that this is a condition precedent.

In the second proviso, the not happening of the event mentioned

would have the effect of putting an end to one estate which existed, and of preventing another which did not exist from coming into existence. In the former case it would operate as a condition subsequent; in the latter as a condition precedent, using, as before, that word in its popular and not strictly legal sense.

The second question proposed is — [His Lordship stated it.] As I am clearly of opinion that the appellant took no estate, it is perhaps unnecessary to answer this question, as the event never happened on which he was to take. But in case he did take such an estate, then it would go over in the events mentioned in the fourth, seventh, and eighth provisos. If Lord Alford did not take any estate, it cannot revive again, but he would take an estate in tail male in the event of Lord Brownlow acquiring a dukedom or marquise limited as required by the sixth proviso, by way of shifting use; within the limits established against perpetuities, it matters not how often the uses shift.

The third question proposed by your Lordships is: "On the decease of Lord Alford, did his brother Charles Henry Egerton, the respondent, become entitled to any and what estate in remainder, immediately expectant on the said term?" I think, that on the decease of Lord Alford, his brother the respondent took an estate for ninety-nine years, if he should so long live.

The fourth question is: "If he did, then is such estate liable to be defeated on the happening of any and what event or events?" My answer to that question is, that it was liable to be defeated by the happening of the events in the provisos fourth, seventh, and eighth.

* The fifth question proposed by your Lordships is: "Are * 122 all or any and which of the several provisos void?" My answer to that question is, None of the provisos is void. The objection to the validity of the several provisos is, that they are impossible, too remote, or illegal.

None of these provisos is impossible, although the party interested may not be able to perform the conditions.

The first is, that Lord Alford shall acquire the title and dignity of Duke or Marquis of Bridgewater. He cannot by his own act acquire it, and therefore it is said to be impossible; but the meaning of the term "acquire" is not if he should obtain it by his own act, but if the Crown should be pleased to bestow that dignity upon

him, and he should accept it. In that sense it is by no means impossible that he should acquire the title.

There is no difference, in my opinion, between the expression "acquire," or "obtain," or "have the title created in his favour," and it should be accepted by him.

The same observation applies to all the other provisos: none is impossible, nor is any one of them too remote.

The old doctrine of a possibility mounted on a possibility, *Cholmley's Case*,¹ cannot be any longer considered as in force, after Lord Nottingham's judgment in *The Duke of Norfolk's Case*,² and the establishment of a definite rule against perpetuities. The case in which grants to now existing corporations or individuals by a particular name have been held void are to be explained on the ground that gifts to persons, *tanquam in esse*, are void for want of proper objects.

The principal question argued at your Lordships' bar was that the provisos were illegal. I am of opinion that none of them is

illegal. The main ground on which it is argued that the * 123 provisos are illegal, is that they are against * "public policy."

This is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean "political expedience," or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the

¹ 2 Rep. 50 a.

² 3 Ch Cas. 1, 29.

prevailing and just opinions of the public good ; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law; and we are therefore bound by them, but we are not thereby authorised to establish as law every thing which we may think for the public good, and prohibit every thing which we think otherwise. The term "public policy" may indeed be used only in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the *established *124 law. If it can be shown that any provision is contrary to well-decided cases, or the principle of decided cases, and void by analogy to them, and within the same principle, the objection ought to prevail. But we are clearly of opinion that this cannot be shown here.

Prima facie, all persons are free to dispose of their property according to their will and pleasure, and are free to make such contracts as they please, and are morally and legally bound by them, provided, in both cases, they adopt the formalities required by the common and statute law. We find, however, from the sources of information from which we derive our knowledge of the common law, that contracts have been deemed to be illegal and void in many cases ; none of them, however, resembling the present. One great class of cases has been that of wagers. Courts have been anxious to discountenance all wagers in which the parties have had no interest, and been astute, even to an extent bordering upon the ridiculous, to find reasons for refusing to enforce them ; such is the case of the wager in *Eltham v. Kingsman*.¹

Others, with just reason, they have refused to enforce, where persons have voluntarily interfered in the affairs of another, and made wagers, the decision of which would affect his feelings or be outrages on decency. Such is the case of *Da Costa v. Jones*.² The question of the sex of an individual could not be made the subject of a wager ; but if it arose in the course of litigation with respect to the real rights of parties, for instance in suing for a legacy left to a male, the inquiry, however indelicate it might be, could not be avoided. In other cases of wagers, where the effect would be to make a man a judge in his own cause, — such is the case of a wager laid by a judge upon the event of a cause which he

¹ 1 B. & Ald. 687.

² Cowp. 729.

* 125 is to decide,— it would be against the * established rule “*nemo in propriâ causâ judex esse debet*” to allow him to acquire an interest in ‘it. *Jones v. Randall*.¹ In the case of *Gilbert v. Sykes*,² the Court certainly went a great length in holding a wager to be void on the life of the late emperor of the French. I doubt much whether, if the matter were *res nova*, that case would be decided in the same way. But if this had not been the case of a wager, but of a policy by one who had an interest in the life of the late emperor of the French, would there be any question as to the right of the assured to recover after his death ?

There are other cases in which contracts or provisos have been held to be illegal on principles long recognised by the common law ; such as marriage brokerage bonds, conditions, or contracts not to marry, in restraint of trade, against alienation of land, including those violating the law of perpetuities ; others have been forbidden upon principles long established in Courts of Equity, where a contract creates an interest at variance with a duty ; all these rest upon established authority. Another referred to was that of *Cole v. Gower*,³ where a promissory note for a certain sum was given to parish officers to indemnify a parish against the expenses of the maintenance of an illegitimate child. The ground of that decision clearly was, that an agreement for a certain sum was against the provisions of the Statute 6 Geo. II. c. 31, which only authorises an indemnity. When public policy is there spoken of by the Judges, it must be understood to be spoken of in reference to the provisions of the statute. It is a statement of the probable reason for making the law, in order to show the true construction of the law made. It would not be contended, that a bond for a * 126 given sum upon a contract by the * obligee to support a man for his life would be void on the ground of public policy, as tending to the insecurity of life.

In this present case, there is a total absence of precedent or authority. The case of *The Earl of Kingston v. Pierepont*⁴ being clearly distinguishable, as will be afterwards shown. Upon what grounds, then, is it to be said that the provisos are illegal ? It cannot be on the ground that the object is illegal ; for the obtaining a title is a worthy and laudable object of ambition. It cannot be that the means intended to be used are illegal ; for that cannot

¹ Cowp. 37.

² 6 East, 110.

³ 16 East, 150.

⁴ 1 Vern. 5.

be inferred from any one of the provisos, or all taken together. Those provisos show a great anxiety on the mind of the testator, that the title should be obtained, but that any improper means should be actually used does not appear on the face of the will, as it did in the case of *The Earl of Kingston v. Pierrepont*. Whether if it were pleaded in a form of action which required pleadings, that such was the real purpose of the bequest, such a plea could be proved, is entirely beside the question which your Lordships propose. No inference whatever can lawfully be made on the face of the will, that such illegal means were really contemplated, and the presumption always is in favour of legality until the contrary appears. If it could be shown that illegal means would be used, or that the probability of their being used was so great that the testator must have actually contemplated and intended the use of them, I should agree that the proviso was tainted with illegality; but nothing approaching to such a case appears.

It is argued then that the provisos are illegal by reason of their tending to cause the use of illegal means, though no intention to use them existed in point of fact. That a * person * 127 might be tempted to use illegal means to obtain a title in consequence of such a proviso is not sufficient. Nor can we justly reason from the magnitude of the estate: some minds would be as much influenced by the prospect of gaining 100*l.* as 100,000*l.* The greatness of the sum to be gained by the compliance with the proviso might be some evidence, if the question of fact were properly raised as to the real intention of the party making the will, but as a ground of avoiding it on legal principles, the magnitude of the sum appears to me immaterial. Where a wager or a contract is void according to the established rules of law, as a wager with a judge as to the event of a cause, or a contract in restraint of marriage, or the like, the sum contracted for signifies nothing. As to the tendency to use corrupt means, can any one say that they were the most probable to be used to accomplish the end? Honourable means may accomplish it, and upon what legal principle are we to presume that they will not be more likely to prevail? Are we to presume that the evil principle would in Lord Alford prevail over the good, and that he would be more prone to attempt to advance his interest by corrupt and dishonest means than by those which are worthy and laudable? Are we to assume that the advisers of the Crown would be more prone to yield to

suggestions of a corrupt than of a pure and honourable character ? It would be indecent to admit the supposition that corruption can prevail for such a purpose.

This supposed tendency to evil would apply to other cases as well as to those which are political. Suppose a large estate left to A., subject to the condition of his becoming senior wrangler and senior medallist at Cambridge. Would it be illegal, as tending to induce him to employ the money in corrupting the examiners, or betraying into idleness and profligacy, or destroying his

* 128 most promising * competitors ? If a large estate is left to a man conditioned that he should within a stated time marry a countess, would it be void, as tending to induce him to use improper means to effect such an alliance ? Or if an estate was

to be forfeited in case the devisee did not take holy orders, or become a dean or a bishop, or take a degree of doctor of divinity in a certain time, would it be void, as having a tendency to induce him to obtain those orders, dignities, or distinctions by bad means ? So the case of a condition to obtain the royal license to use a particular name and arms, a most common occurrence, might on similar grounds be impeached, as having a tendency to cause the royal license to be obtained by corrupt means. So even also the clause, in the form in this will, which is to use "the utmost endeavours to obtain it," might be said to have a similar though a more remote tendency to the same end ; and yet to object to either of such clauses, on either ground, seems to be utterly untenable. Nay, a limitation to one for life, remainder to another, might be said to be void, as having a tendency to cause the remainder-man to try to kill the tenant for life ; a limitation to first and other sons successively in tail, to induce the second son to destroy the life of the elder by a direct act of murder, or a continued course of cruelty and unkindness, or to use fraudulent artifices to prevent him from marrying. Insurances on lives might be avoided on the same ground. Insurances of property against fire, contracts by burial clubs to pay sums of money for the funeral of wives or children ; in short, there are few contracts in which a suspicious mind might not find a tendency to produce evil ; and to hold all such contracts to be void would, indeed, be an intolerable mischief.

Many similar instances might be put in which the adoption of this principle would lead to the most dangerous consequences

to the freedom of disposition by a testator, and * to *129 the obligation of contracts and conveyances *inter vivos*.

The great principle of the law has been to leave both entirely free. The only case at all bearing upon the question of obtaining a peerage is that of *The Earl of Kingston v. Pierrepont*¹ already cited; but it differs in this essential particular, that there the money claimed was bequeathed for the express purpose of being applied in obtaining a dukedom, and differs as much from the present, as a gift to A. on condition of his taking holy orders would differ from a bequest of money to be applied in obtaining holy orders, which would no doubt be illegal.

Another objection is, that these provisions are illegal, because they tend to embarrass the Crown in the exercise of its prerogative. We are bound to assume that the Crown, in the exercise of its grace and favour, will be guided solely by constitutional considerations, by regard to merit, loyalty, and public services; and we cannot imagine any thing more illegal in that which is said to be a difficulty in the way of a free exercise of the prerogative, than in rival applications for the same office or the same title. If a man during his life were to apply to the sovereign to grant a peerage to A., and offer if it were done to endow its holder with an ample fortune, no authority has been quoted or argument adduced to show that he would be acting illegally or corruptly; and yet in principle we cannot distinguish such a case from the present.

I think, then, that all the first six provisos are good, and not void on any ground, and that in every case to which they apply as conditions subsequent, the limitation would be defeated by non-compliance with them.

The seventh and eighth provisos are impeached upon another ground, viz. that it is the duty of every subject to obey the summons of the Crown to Parliament, and that he * is bound *130 to take his place in Parliament as a peer, and by any title that the Crown may choose to bestow upon him. This is a very refined objection; nevertheless, if well founded, it ought to prevail; but we think it is not well founded. As to Lord Brownlow, he being already a peer of Parliament, and bound to attend to advise the Crown in that character, I do not think that he is bound by his duty of allegiance to attend Parliament by another title or

¹ 1 Vern. 5.

accept a fresh patent; and no authority can be found in support of such a position. The seventh proviso, therefore, is not illegal, as encouraging the violation of this duty of a subject.

The eighth is said to be objectionable on the ground that it provides that if Lord Alford or Mr. Charles Henry Cust, both commoners, or the heirs male of his body, shall take any title other than that of Duke of Bridgewater, to which the Marquis of Bridgewater shall not if then, or could not if thereafter to be, created, be superior in rank, or have precedence, being of the same rank, then the uses limited to them shall be void. The other parts as to succeeding to a title are unobjectionable.

It is argued that these, being commoners, would be bound, not only to obey the summons of the Crown, but to obey it by whatever title the Crown chose to give him in the writ. That a commoner is bound to appear to the writ of summons must probably be conceded, although in *Lord Abergavenny's Case*,¹ it is said that the person to whom it was addressed might have excused himself or waived it and submitted to fine. But we conceive that there was an obligation in point of law to obey, and the fine was only a means of enforcing it; and therefore a condition subsequent to

defeat an estate might be illegal on the ground that it was a
*131 condition to disobey the king's writ. But I think * that

this condition is not illegal. There is no authority that I am aware of, that a subject may have a writ directed to him by any name by which he is not previously known, or which he does not choose voluntarily to adopt, nor any authority that he is bound to accept a patent of nobility which he is not willing to accept by a name which he does not choose to adopt. Therefore we are of opinion that the last of these conditions is not illegal on the ground that it is a condition to disobey the lawful mandate of the king.

We also think, that as all these eight conditions are separate from each other, one may be void without affecting the validity of the others; and though if an invalid condition subsequent should occur, the limitation would not be defeated, that would not prevent a valid condition subsequent from operating to defeat the limitation.

It is said that all these provisos have one object, and show the testator's intention to accomplish it. But the object is lawful.

¹ 12 Rep. 70 b.

The anxiety of the testator to accomplish it by so many stringent provisions might be made some evidence of the real intention of the testator to use improper means, but it would be evidence only; and if that intent had been averred, and could be proved to have been in fact that corrupt means should be used, all would be void; but on the face of the will no such intention can be seen, and to infer it would be to act upon mere loose suspicion, without any legal ground whatever, and contrary to the usual rule,— that legality, not illegality, is to be presumed until the contrary is proved.

THE LORD CHIEF BARON.— In dealing with the seven questions proposed by your Lordships to the Judges, it appears to me to be the more convenient course to answer them, not in the order assigned to them by your Lordships, but to take in the first place * the sixth question and then the fifth; as it appears * 132 to me that upon these all the rest depend, and these are the questions that have been principally argued at your Lordships' bar. I propose, therefore, to consider the sixth question first, which is,— “Are the provisos, or any and which of them, to be treated as being conditions precedent?” The only provisos as to which any doubt can be entertained, and to which any argument has been directed, are those which relate to the acquiring or acceptance of a peerage, and especially those which declare the will of the testator to be, that in certain events the uses and estates limited to the heirs male of the body of Lord Alford in the first instance, and then, secondly, of Charles Henry Cust, shall “cease and determine”; and to these provisos alone the following remarks are intended to apply.

This, my Lords, is purely a legal question, turning on the true construction of the will, on the intention of the testator, and the effect to be given to that intention if it can be discovered, and it involves some of the most obscure and difficult and doubtful matters connected with our judicial system.

The original maxims of the law of real property were extremely simple and clear, but various causes, chiefly perhaps a continued struggle on the part of judges to adapt it to the growing exigencies of society, and a few Acts of Parliament intended to improve it, have elaborated it into an extremely refined and artificial system, in the administration of which there has been recorded more dif-

ference of opinion among eminent and enlightened Judges than in any other branch of our law. I allude to such cases as that of the Duke of Norfolk, where the Chancellor was of one opinion and the three Chiefs of the Common Law Courts of an opposite opinion.

The succeeding Chancellor overruled the judgment of his * 133 predecessor, and finally, this House affirmed * it. Many similar examples may be found. But giving to the subject the best consideration in my power, I am of opinion that the proviso (that the uses and estates limited to the heirs male of the body of Lord Alford, in the events stated in the will, shall cease and determine) ought to be treated as being a condition subsequent, not precedent, and for the following reasons : —

1st. I think the devise to Lord Alford and the heirs male of his body ought to be considered and treated in this instrument as one devise, one remainder, one entire disposition of the property in favour of one branch of the testator's family ; and this devise having taken effect by Lord Alford having been actually in possession, whatever defeats this disposition of the property in favour of Lord Alford and the heirs male of his body, must operate by way of condition subsequent.

It is very true, that Lord Alford did not take any freehold estate (he took merely a chattel interest) ; it is also true that the heir male of his body would (on his death) take not by descent, but as a purchaser ; but these are artificial and technical results of the arrangements introduced into the will, not to defeat but to protect and insure the testator's object, which was, that (subject to the proviso) the estate should really go to Lord Alford and the heirs male of his body. That was manifestly his general intent, which intent (in giving effect to the language of the will) ought to govern our construction of it ; and I think to take a different course would be really to use, as a means of destroying and defeating the testator's intention, those technical arrangements which he introduced and intended for its preservation.

No doubt, for technical reasons, the heir male of the body, although so called — so designated, does not take as heir, * 134 but as a purchaser ; but the testator cared nothing * about him individually ; his intention was, in substance, to give the estate to Lord Alford for life, by giving him a chattel interest (that would in all human probability last longer than his life), and giving it to him for the whole period, if he should so long

live, and then to the heirs male of his body, by way of contingent remainder ; the general intention therefore is to give it to Lord Alford for life, and afterwards to the heirs male of his body. Such a disposition of the property in a will ought in my judgment to be considered and treated (whatever may be the form of it) as one remainder to Lord Alford and the heirs male of his body ; that is, as one remainder to that branch of the testator's family.

In the second place, I think this proviso is to be treated as being a condition subsequent, because it is manifest that the testator intended it should be so treated. It is on all hands agreed, that whatever may be the form of language used, the intention of the testator in such a case is to prevail. Now the proviso is first alluded to and mentioned at the end of the devise to Lord Alford and the heirs male of his body, and to Charles Henry Cust and the heirs male of his body ; and it is thus described : " Subject nevertheless, as to the several uses and estates so to be limited to the said John Hume Lord Viscount Alford, and Charles Henry Cust, and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several provisos for the determination thereof hereinafter contained." In this case, therefore, the form (the language used) is manifestly that of a condition subsequent. Perhaps, strictly speaking, it is not a condition at all, for no estate arises, accrues, or is enlarged on its performance. It is really what it professes to be, " a proviso for the cesser of a certain use or estate " in a certain event ; and, it may be, that all the learning about conditions, and the rules that * govern their construction, are wholly inapplicable to this case ; but I am now merely on the question of the testator's intention. If this had been meant to operate as a condition precedent, nothing would have been more easy than so to have expressed it. The will is framed with the greatest care, obviously by a person of the highest skill in the conveyancing branch of the profession, and he has framed the proviso in terms which seem to have been studiously adopted, in order that there should be no doubt of his meaning.

In certain cases, such as, if Lord Alford had become Earl Brownlow, and had not (within five years of his becoming Earl Brownlow) acquired the title and dignity of Duke or Marquis of Bridgewater, the proviso must have operated (if at all) as a condition subsequent ; and there is not the least ground for arguing

or even supposing that the testator meant the same form of words to operate differently in different cases, but quite the contrary,—that he meant them to operate in the same way in all cases. As, therefore, in one case, which was distinctly foreseen and provided for (viz. Lord Alford's surviving his father for more than five years, and not obtaining the requisite title), the condition must have operated (if at all) as a condition subsequent, it is most reasonable to infer that the testator intended it to operate in every instance and on every occasion in the same way as a condition subsequent. By the same identical form of language and expression he must be understood to have meant the same identical thing.

With a view to throw some further light on the intention of the testator, I would here observe, that it is highly probable that some doubt was entertained as to the lawfulness of the proviso, and that the will was prepared and the proviso framed in the present form expressly with reference to that doubt. If the proviso was void

and Lord Alford became Earl Brownlow, and so continued
*136 for five years *without obtaining the title, the proviso

would operate, if at all, as a condition subsequent ; but if void, it would be inoperative, and would be gone for ever,— it could not affect any estates arising after ; but in the events that have occurred, if it is now to operate as a condition precedent, the estate and interest intended for Lord Alford and the heirs male of his body will be defeated and the estate will go over. Now in a will so carefully prepared, and about which so much skill has been exercised, it is difficult not to believe that this must have been and was foreseen, and that it could not have been intended that the benefit to Lord Alford and the heirs male of his body (assuming the proviso to be void) should depend upon the contingency whether Lord Alford survived Lord Brownlow more than five years, or whether he died (as has happened) before Lord Brownlow. I am therefore induced to think that, to guard against this, the proviso has been cautiously put into the clearest, plainest, and most unmistakeable form as a condition subsequent, to operate as a cesser and not as a condition precedent, and that it is an unauthorised violence to the language of the will and of the proviso to treat this as a condition precedent, and that no refinement of legal reasoning can make a testator say and mean the very contrary of that which he has taken the greatest pains to

express that he does not mean, and will not say. If therefore the intention of the testator is to prevail, it appears to me to be quite clear that it was his intention that this should operate as a condition subsequent, and not as a condition precedent, and therefore it ought not to be treated as a condition precedent.

But, thirdly, reading the proviso itself and reading that part of the will where it is first mentioned, and upon which it was intended to operate, it appears to me that there is no necessity to do any violence to the testator's language, * and *137 that there were "uses and estates" on which the proviso might operate as a condition subsequent. The testator says, certain uses and estates shall be subject to the several provisos for the determination thereof; and there are uses and estates which may be made to cease and determine, and upon which the proviso may operate as a condition subsequent. An estate may be in possession, or it may be in remainder and vested, or it may be in remainder and not vested, but only contingent; but a contingent remainder is as much an estate as an estate in possession; and if it were not, the testator has so called it, and pointed out distinctly what he means, and upon what the proviso is to operate (viz. on the uses and estates limited to Lord Alford and Charles Henry Cust, and to the heirs male of their respective bodies), and he has expressly stated in what manner the proviso is to operate, viz. by making those estates cease and determine.

It is true the estate or use to the "heirs male of the body" could not be a vested estate till the death of Lord Alford, and it is equally true that the individual who would take it was uncertain till that event happened, because *nemo est hæres viventis*; but the estate existed, and (had been) created by the will, ready to be taken by the heir male, when he should be ascertained, and this is the estate which the testator says shall cease or determine. But I understand it to be said by my learned brothers who take a different view of the subject, that the estate did not exist: I apprehend this is not correct; the estate did exist, was expressly created by the will, but was made subject to the proviso. Had, indeed, the coming into existence of the contingent remainder depended on the acquisition of the title (which might have been the case had its creation or origin depended on the proviso), the case would have been different; and this appears to me to be the fundamental * error, the fallacy of the opposing argument, — *138

viz. confounding together two things totally different, because they may have the same practical result; it is like confounding an estate for 1000 years (if the party should so long live) with a freehold interest for life, because the effect and the result would probably be the same.

My Lords, in my judgment there is a real and essential difference between making a contingent remainder come into existence upon the acquisition of the title, and creating it by the will as a distinct substantive "estate and use," but making it subject to a proviso that it shall cease and determine if the title be not acquired. In the one case the estate never exists at all till the title is acquired, in the other it does exist, but ceases and determines upon the failure to acquire the title within the prescribed period. This is what the testator has expressed; and why should it be said that he did not mean it; nay more, that he cannot by law mean it, and must not, and shall not be permitted to mean it, and that whether he meant it or no, some technical reasoning is to put a construction upon his words to make the proviso operate as a condition precedent (all the authorities agreeing that, whatever the expressions may be, the intention is to prevail). For these reasons:—

1st. That this was one remainder only to Lord Alford and (contingently) to the heirs male of his body, which remainder had taken effect by the possession of Lord Alford.

2d. That on examining the language and the whole frame and structure of the will, it is manifest the provisos were intended to operate as conditions subsequent.

3d. That even if the contingent remainder is regarded alone, without reference to Lord Alford's estate, making with it only one remainder, there was an estate and use for the proviso to operate on, and to cause to cease and determine.

*139 For these reasons, my Lords, I answer the sixth *question, that the provisos are not to be treated as being conditions precedent, but as being conditions subsequent.

I shall now proceed to state my opinion on the fifth question, which is: "Are all, or any, and which of the several provisos void?" The only provisos which have been made the subject of any doubt or controversy, and which, therefore, alone are necessary to be noticed, are those which relate to the acquisition or non-acquisition of certain peerages, and especially of the title and

dignity of Duke or Marquis of Bridgewater by Lord Alford or by Charles Henry Cust; and the question is, whether it is competent to the owner of an estate to create, by deed or by will, one or more contingent remainders, or conditional limitations, which shall depend upon the exercise of the royal prerogative in creating a peerage in a particular family, with a particular title, and with prescribed limitations.

There is no direct authority for saying that this can or cannot be done. On the immediate point there is no direct decision either way. The absence of any authority may be accounted for by the fact that this is the first attempt to create such a condition since the peerage has existed. In the case of *The Earl of Kingston v. Pierrepont*,¹ the testator gave 10,000*l.* to be employed in procuring a dukedom, and the gift was held void. That case is not decisive of the present, but it involves principles common to both. In considering this question, I think nothing turns upon the use of the word "acquired." I think no importance can be attached, or special meaning be ascribed to that word; it is not worse than the word "obtain," but it is not better than the word "procure," which occurred in the case just mentioned. I think it means, if he shall die * without becoming Duke or Marquis of Bridge- * 140 water; the testator having left him an immense landed estate to enable him to acquire or obtain or procure the title in question with the ominous condition, that if he did not get it, he himself should in one event, and his family in another, lose the estate; and the question is, is this a lawful condition to annex to an estate? It is perfectly clear and certain (as a principle of law) that if this condition be against the public good, it is void. This is distinctly laid down in Sheppard's Touchstone, Chapter Six, where among other conditions which are contrary "to law" or "against the liberty of the law," a condition is also pronounced to be void which is "against the public good"; and the learned writer must have meant something "other than" and different from "contrary to law." So Lord Coke,² in treating of conditions which are void as "against law" (though they concern not any thing that is *malum in se*), mentions those that are against some maxim or rule of law, and those which are "repugnant to the state," which I take to be, in effect, the same as the expression in Sheppard's Touchstone of "against the public good." Here, also,

¹ 1 Vern. 5.

* Co. Litt. 206 b.

it is clear the writer meant something different from, and not included in the expression, "against some maxim or rule of law." The authority referred to in the margin of Coke is Bracton: ¹ the passage is, "*Ac si quis rem promitteret quæ in rerum naturâ non esset, vel esse non posset, vel si rem sacram vel publicam, quæ non est in alicujus bonis.*"

I think, therefore, I am bound to lay down this principle as a clear and undoubted maxim of law, that if this condition be "against the public good" (the expression in Sheppard's Touchstone), if it be "repugnant to the state" (the expression in Coke), it is void.

* 141 * This narrows the inquiry to this point: "Is it against the public good that such a condition should be created and enforced?" and this is what your Lordships have to decide.

Let me here (before I proceed further) point out distinctly and nakedly what is the effect of the condition, and the relation in which it places the members of the testator's family.

A nobleman seeing his title about to become extinct, and desirous of reviving it in the female line, but with a higher grade in the peerage, leaves his immense wealth to one branch of his family, subject to a forfeiture of the estate, if the title be not acquired within certain periods. It is then to go over to a second branch in the same line, and they are to try what they can do to accomplish the testator's object in getting the peerage in question into his family, and if they also fail, they are to forfeit the estate, and it is to go over to a more distant branch. So that while one branch of the family has a strong pecuniary interest to get or acquire the peerage, other branches have a strong pecuniary interest to oppose and prevent it, in order that they may benefit by the forfeiture; and this is not the accidental result of circumstances arising in the ordinary course of events, but is specially and gratuitously occasioned by the mere caprice and will of the testator. Now, in order to ascertain whether this condition be valid or not, I propose to consider whether any conditions can be suggested which would be deemed void by the common consent of all statesmen, lawyers, and persons of intelligence, and to examine on what grounds such conditions are void or would be deemed so, and to see if any general maxim or principle can be collected or extracted, which will be of general application,

¹ Book III. fol. 100.

and to ascertain whether the present case is within that principle.

* In those periods of our history when the succession to the Crown was disputed, would it have been deemed competent to a subject (would he have been permitted) to make the course of succession to his estate to depend on the succession to the Crown, and to turn upon the predominance of the house of York or Lancaster, and especially would it have been permitted if the condition or limitation had been introduced for the avowed object of supporting one or other of the contending parties ? But I propose to put three distinct cases: 1st. During the Commonwealth could a stanch republican have left his estate to his heir, or to some devisee, subject to a proviso that in the event of the restoration of the monarchy it should go to some college, hospital, or public charity, and especially if he avowed that his object was to give his heir or devisee an interest in supporting the anti-monarchical government ? 2dly. In the reign of Charles II. could a zealous Protestant have introduced a similar condition, based on the passing of the Exclusion Bill, and on the Duke of York not ascending the throne ? 3dly. In the reign of Anne, could a sincere Roman Catholic have framed a similar condition founded on the repeal of the Act of Settlement within a given period ? And, on the restoration of monarchy in the first case, on the ascent to the throne of James Duke of York in the second case, and on the non-repeal of the Act of Settlement in the third case, would our Courts of Law (including this high Court of Parliament) have enforced these conditions, or would they have declared them void, and left the heirs or devisees in the enjoyment of the estates ? Cases of this sort may be multiplied indefinitely from various periods of our history, during the wars of the Roses, and during the reign of Henry VIII. and some subsequent reigns when the succession to the Crown was uncertain.

* Having proposed the above questions with respect to the succession to the Crown, I would next inquire whether a condition could be made to depend upon the whole Legislature adopting or rejecting some particular line of policy on which depended, or might depend, the safety, or the honour, or the welfare of the kingdom. Could the form of government, the mode of representation, the established religion of the country, questions of toleration, whether Roman Catholics should be relieved, or

Jews admitted to Parliament, or the Test Act be established, or repealed? could any of these be made the foundation of a condition, and with the avowed object of effecting or assisting the views of the donor or testator on the matter which formed the basis of the condition? So,—not unnecessarily to multiply instances, but to come to more recent times,—when the Reform Bill had been once rejected by the Upper House, and was a second time about to be sent up by the Commons, could such a condition (as has been already referred to) have been made to depend upon, whether the Crown would create (not one peer) but a large number of peers, with a view to assist in passing the measure of reform, and whether ultimately it would receive the assent of the Crown? In all, or most of these cases, I should expect all statesmen, and a very large majority of all lawyers (if not absolutely all), and most persons of intelligence acquainted with our constitution, would concur in the opinion that such conditions were contrary to sound policy, were against the public good, dangerous to the public safety, and therefore were void.

I now propose to examine how far “public policy,” or the “good of the state,” has been recognised as a ground of decision with reference to covenants, contracts, and other matters; but

*144 before I do that, I am desirous of pointing out to your Lord-

ships the difference in this respect * between a condition and a covenant or contract. Lord Coke lays it down, that conditions are not to be favoured; and in *Machel v. Dunton*¹ it was laid down by the whole Court, “that a condition is a thing odious in law”; and this dictum is copied into all our text-writers and law treatises; and the reason is obvious, because a condition interferes with the absolute vesting of the estate, which the law always favours, and it controls the ownership; it seeks to exercise a dominion over the property after the death of the donor; it opposes the will (possibly the caprice) of the dead to the *jus disponendi* of the living. The law, therefore, while it encourages commerce and favours contracts, deems a condition odious, and looks at it with jealousy. The owner of an estate may himself do many things which he could not (by a condition) compel his successor to do. One example is sufficient. He may leave his land uncultivated, but he cannot by a condition compel his successor to do so. The law does not interfere with the owner and compel

¹ 2 Leon. 33, Owen, 54–92; and see Cro. Eliz. 288, and Poph. 8.

him to cultivate his land (though it be for the public good that land should be cultivated), so far the law respects ownership ; but when, by a condition, he attempts to compel his successor to do what is against the public good, the law steps in, and pronounces the condition void, and allows the devisee to enjoy the estate free from the condition.

I advert to this, to establish the position that whatever is bad as a covenant, or contract, must be bad as a condition *à fortiori*.

This doctrine of the public good or the public safety, or what is sometimes called "public policy," being the foundation of law, is supported by decisions in every branch of the law ; and an unlimited number of cases may be cited as directly and distinctly deciding upon contracts and covenants on the avowed broad ground of the public *good, and on that alone ; and * 145 the name and authority of nearly all the great lawyers (whose decisions and opinions have been extensively reported) will be found associated with this doctrine in some shape or other. It is distinctly laid down by Coke,¹ "*nihil quod est inconveniens est licitum.*"

It is above a hundred years ago that Lord Hardwicke, in *The Earl of Chesterfield v. Janssen*,² thus expressed himself in giving judgment, alluding to marriage brokerage bonds : "The Court relieves for the sake of the public as a general mischief." May I venture to ask your Lordships whether peerage brokerage bonds would be entitled to greater favour ? Lord Hardwicke continues : "So in bargains to procure offices, neither of the parties is defrauded, but it serves to introduce unworthy objects into public offices, and therefore for the sake of the public the bargain is rescinded." And again : "Political arguments, in the fullest sense of the word, as they concern the government of a nation, must be, and have always been of great weight in the consideration of this Court ; and though there may be no *dolus malus* in contracts as to other persons, yet, if the rest of mankind are concerned as well as the parties, it may properly be said that it regards the public utility."

So in *Lawton v. Lawton*,³ the same eminent Judge said, "These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion."

¹ Co. Litt. 66 a.

² 3 Atk. 16.

³ 1 Atk. 352.

In *May v. Brown*,¹ Mr. Justice Holroyd (a lawyer of no mean authority) said: "The argument '*ab inconvenienti*' is of importance in considering what the law is, and there cannot be any doubt that the reception of this evidence would tend to great inconvenience and injustice."

*146 * I have seen indeed a reference to the case of *Richardson v. Mellish*,² where Chief Justice Best and Mr. Justice Burrough expressed opinions on the subject of deciding matters of law on the ground of public policy; but in that case those learned individuals did not disaffirm the doctrine, but merely laid down that (as a ground of decision) it ought to be used with great care and caution; Chief Justice Best said he would not decide on a doubtful question of policy, and Mr. Justice Burrough merely said, You must not argue too strongly on public policy; and so far from Lord Chief Justice Best being of opinion that public policy was not a ground of legal decision, it appears that in the case of *Gifford v. Lord Yarborough*³ Lord Chief Justice Best in delivering the unanimous opinion of the Judges to your Lordships' House four years after Mellish and Richardson was decided, said: "The Judges are therefore warranted by justice, by public policy, by the opinions of learned writers, and the authority of decided cases, in giving the answer they have directed me to give"; and the same learned Chief Justice, in *Fletcher v. Lord Sondes*,⁴ in stating his opinion to your Lordships' House, said: "I am aware these are rather considerations of policy than law; but, my Lords, if there be any doubt what is the law, Judges solve such doubts by considering what will be the good or bad effects of their decision"; (and he adds) "That doctrine cannot be law which injures the rights of individuals, and will be productive of evil to the Church and to the community." These are the deliberate and well-considered expressions of Lord Chief Justice Best, probably written down with care before they were delivered to your Lordships. I may add that in the same case of *Fletcher v. Lord Sondes*, another of the learned Judges, Mr. Baron

*147 * Hullock,⁵ in stating his opinion to this House, said: "The bond in this case operates equally against public policy (alluding to the case of *The Bishop of London v. Ffytche*), and is, therefore, on that ground equally void and illegal."

¹ 3 B. & C. 131.

⁴ 3 Bing. 590.

² 2 Bing. 229.

⁵ 3 Bing. 538.

³ 5 Bing. 169.

Now, the principle that certain contracts are illegal, and therefore void, because they are against public policy or the public good, is familiar to every lawyer. Why are seamen not allowed to insure their wages (which is their part of the adventure), as well as the owner his ship, or the merchant his goods? Because it is for the public good that they should have no motive to relax in their exertions to preserve the ship and cargo. Why are trustees not allowed to enter into contracts with their *cestui que trust*? Why was it held by Lord Ellenborough unlawful for the putative father of an illegitimate child to compound with the parish and to pay or secure a gross sum to the parish, they taking the chance of the expense being more or less? Because it was against public policy. And this doctrine has been confirmed in several cases in every Court in Westminster Hall. So in the case of wagers, it is now fully established that no contract in the nature of a wager is valid which is against public policy. It is true in *Walcot v. Tappin*,¹ and in *Andrews v. Herne*,² which, though so differently named, turn out to be the same case, the plaintiff was allowed to recover twenty pounds from the defendant who had betted that sum against twenty shillings paid to him on the event of Charles Stuart becoming King of England in six months. No objection was taken to the unlawfulness of the bet, and the royalist who had backed his sovereign recovered against the republican who had betted twenty to * one against him; but in *148 *Good v. Elliott*,³ Buller, J. pronounces the contract illegal; and in *Gilbert v. Sykes*,⁴ Mr. Justice Le Blanc expressly says no such action could now be maintained.

In that last case of Gilbert and Sykes, Lord Ellenborough lays down, "Wherever the tolerating of any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held to be void"; and he cites the authority of Lord Mansfield in *Jones v. Randall*.⁵ The result of the cases seems to establish this distinction: that, where a contract is directly opposed to public welfare, it is void, though the parties may have a real interest in the matter, and an apparent right to deal with it; but where the contract is altogether gratuitous, and the parties have no interest but what they themselves create by

¹ 1 Keble, 56, 65.

⁴ 16 East, 150, 162.

² 1 Lev. 33.

⁵ Cowp. 37.

³ 3 T. R. 693.

the contract, it is sufficient that there be any tendency whatever to public mischief to render the contract void. An attention to this distinction will reconcile all the cases, and will furnish an answer to much that has been said in favour of this condition. This condition is purely gratuitous. If, therefore, it has any tendency to public mischief, it is void.

There is one other case I am desirous of mentioning, *Norman v. Cole*,¹ a decision of Lord Eldon's when Chief Justice of the Common Pleas. A sum of money had been lodged to assist in procuring a pardon, and the action was brought to recover it back. I cite the case not for the particular decision (it was held that the action would not lie), but for the principle laid down by Lord Eldon : he says, "Where a person interposes his interest and

good offices to procure a pardon, it ought to be done

* 149 *gratuitously, * and not for money.*" The doing an act of that description should proceed from pure motives, not

from pecuniary ones ; and it is the pecuniary motive that exists in this case, and that was created expressly that it might operate as a pecuniary motive, that constitutes, in my opinion, the vice of the condition. The allusion in the last case to a pardon induces me to put this case to your Lordships : suppose some member of the Derwentwater family were to become immensely wealthy, and were to leave large possessions to a relative, with a condition that, unless he procured the reversal of the attainer and the restoration of the peerage, he should forfeit the estates, and they should go over to another devisee : would such a condition be good ? would it be good in respect of the reversal of the attainer ? I cannot entertain a doubt that it would be clearly bad. Would it be good for a restoration or revival of the peerage ? It seems to me impossible to distinguish this last case from that now before your Lordships ; it is the very case under discussion. My Lords, after all these authorities, am I not justified in saying that, [were I to discard the public welfare from my consideration, I should abdicate the functions of my office, — I should shrink from the discharge of my duty ?] I think I am not permitted merely to follow the particular decisions of those who have had the courage to decide before me, but in a new and unprecedented case to be afraid of imitating their example. I think I am bound to look for the principles of former decisions, and not to shrink from applying

¹ 3 Esp. 253.

them with firmness and caution to any new and extraordinary case that may arise.

The conclusions to which I have arrived, from the decided cases and the principles they involve, are, that all matters relating to the public welfare — all acts of the Legislature or the executive — must be decided and determined * upon their own merits * 150 only ; and that it is against the public interest (and therefore not lawful) for any one officiously, wantonly, and capriciously, without any motive but his own will, to create any pecuniary interest or other bias of any sort in the decision of a matter of a public nature, and which involves the public welfare, the party creating that interest having no special and particular individual interest in the subject matter with which he intermeddles. My Lords, in the case of wagers and contracts this has been repeatedly and solemnly decided by all the Courts (and the case of conditions is an *a fortiori* case). It is no doubt some restraint upon the freedom of human action, and some limit to the contracts a man may make and to the mode in which he may use or dispose of his property, but (as far as wagers are concerned) it was (before the late Act of Parliament) the clear, settled, established law of the land, vouched by the decisions of every Court in Westminster Hall, spread over a period of upwards of a century ; and the Judges who have concurred in these decisions include every illustrious name that has adorned the profession of the law during that time. In principle I cannot find any distinction between a wager during life and a condition annexed to a legacy or devise to take effect after death : the mischief of both is precisely the same. If there be any distinction in respect of the right to dispose of property, it ought rather (as it seems to me) to be in favour of the right of the owner to dispose of it as he pleases while alive ; but I think there is no distinction, and I am of opinion that, according to the law of England, the owner of property cannot make any matter the subject of a condition to operate after his death which he could not have made the subject of a contract or a wager during his life ; I think no man can leave his property clogged and conditioned by his own personal * views of public affairs, or by * 151 his posthumous ambition (if I may so call it) ; he cannot make his political opinions run (like a covenant) with his land ; he may leave it to whom he pleases, but it must be unfettered by any condition bearing upon matters connected with the public welfare, as

to which he must leave those who come after him to decide, and to act upon their own view of the merits of any public question, unfettered by any condition which may create a motive or exercise an influence that would disturb a judgment that ought to be founded on the public good alone.

My Lords, it may be that Judges are no better able to discern what is for the public good than other experienced and enlightened members of the community ; but that is no reason for their refusing to entertain the question, and declining to decide upon it. Is it, or is it not, a part of our common law, that in a new and unprecedented case, where the mere caprice of a testator is to be weighed against the public good, the public good should prevail ? In my judgment, it is.² Whether the public good is really concerned in this condition, and the principle which it involves, is the question for the consideration of your Lordships ; and your Lordships will have to decide whether or not it be mischievous to the community at large that every branch of the public service, civil and military, every department of the state, should be besieged by persons who, at the peril of losing their estates, are making every effort to obtain offices for which they may be unfit, and to procure titles and distinctions of which they may be unworthy ; that no man should be able to accept or decline public service without searching the wills at Doctors Commons to see whether he may not thereby call into action some condition precedent or subsequent

which may ruin himself or some very near relation ; that

* 152 an able statesman or a victorious * general should (in some period of great emergency) have to choose whether he will

save his country and lose his estate, or save his estate by declining the public service ; and finally (in addition to the present complicated system of conveyancing) that the real and ultimate ownership of a large portion of the landed property of the kingdom should remain in abeyance till it appeared whether one member of a family would become a bishop, another member of another family a common law or equity judge, who should (thirty years hence) have the custody of the great or privy seal ; or, whether the members of the learned professions in London should one day have the privilege of returning members to Parliament, and whether the young gentleman now at school should become one of such members, and afterwards a peer of the realm. My Lords, I am not sure that some limit may not be discovered to the fanciful vagaries and

capricious conditions with which property may be bequeathed, though it touch not the public interest ; but the moment conditions (in this case a series of conditions) are introduced, which in principle have a strong tendency opposed to the public welfare, the common law, which favours no conditions, but deems them odious, is strong enough to stay the evil and repress the mischief ; and in a perfectly new case (a case altogether *præmæ impressionis*) I think the Judges are bound to hold fast to the principles of the common law, to remember the maxim *salus reipublicæ supra lex*, and if the condition be really in principle against the public good, to pronounce it in their judgment void.

It only remains for me (on this point) to inquire whether this particular condition, the obtaining a peerage by Lord Alford within a limited period, is a condition which falls within the principle I have endeavoured to establish ; and I am of opinion that it is. A peer, in addition to being a * member of one * 153 branch of the Legislature, is an hereditary counsellor of the Crown, and one of the Judges of the highest court of judicature in the realm. The framer of this will seems to have thought of nothing but the title and dignity of a peer, and to have overlooked his important duties, and the interest which the public have in the correct discharge of them ; he seems to have considered the peerage as merely giving a high position in the table of precedence, as being a bauble, the subject of bargain or barter, contract or condition, and to have forgotten that a peer is at once a legislator and an expounder of the statutes, that it is his office to frame and also to decide upon the law, and that he has, in the constitution of this country, duties to perform of the greatest importance to the public welfare. The creation of a peer is an exercise of one of the prerogatives of the Crown, which the Crown possesses, like all other prerogatives, for the good of the country, and which ought to be exercised solely with reference to the public welfare, and the merits of the individual to be promoted, and the cause or occasion of his promotion. It was the object (no one could have doubted it if it had not been avowed, but it was the avowed object) of the testator by this condition to endeavour to obtain a renewal of the peerage in his family, which he foresaw would expire with himself or his brother ; he endeavoured to create a strong pecuniary interest to procure a peerage, and he did so that the peerage might be got ; he knew the influence that great wealth and large possessions ex-

ercise in the affairs of the world, and he took his chance whether they would be well or ill employed, so that they were successfully employed in accomplishing his end and aim, or, as he expressed it himself in his own language, in the codicil of the 31st March, 1823, "my object of uniting my estates to the title of Duke or Marquis of Bridgewater." With this view he created this

* 154 * strong, powerful, and dangerous pecuniary interest to obtain the peerage, — an interest which might very possibly lead to unworthy attempts to obtain it. He prescribed the end, and he furnished the means, and he set no limit or bounds to the use of them ; and it is impossible, I think, to doubt that he intended this condition to operate upon the mind of the Sovereign, or the minds of those who advise the Sovereign (and expected it would or might do so), to grant the peerage by reason or on account of the conditions, and from motives other than those which alone ought to operate, viz. the public good, and the merits of the individual to be promoted, and the cause of his promotion. I am of opinion that it was not competent to the testator so to deal with his property ; that it is quite inconsistent with the public welfare, and even the public safety, that property should be bequeathed subject to conditions unnecessarily, capriciously, wantonly, and officiously introduced, and made to depend on any public act of state, whether the Crown, the Legislature, or any branch of it, or of the executive government ; and I am therefore clearly and undoubtedly of opinion that this condition is unlawful and void.

I shall detain your Lordships but a moment while I state my answers to the other questions : —

1st. On the decease of Lord Alford, his eldest son, in my opinion, became entitled to an estate tail male in possession.

2d. I am of opinion, that such estate is not liable to be defeated. I think all the clauses in the will relating to the acquisition or the acceptance or non-acceptance of a peerage are void.

3d. On the decease of Lord Alford, his brother Charles Henry Egerton took no estate in possession, but (expectant on the * 155 failure of the heirs male of the body of Lord * Alford) he took the residue of the term if he should so long live.

4th. I am of opinion that such estate is not liable to be defeated by the acceptance or non-acquisition of any peerage by any one.

The 5th and 6th I have already answered. As to the 7th, I am

of opinion that in the events that have happened the jointure appointed in favour of Lady Marianne Alford has not ceased.

August 19.

LORD LYNDHURST.—My Lords, I have read and considered with attention the opinions of the learned Judges in this case, and, after weighing the reasons upon which they are founded, I am constrained to say, though with much deference, that I differ from the conclusions of the majority of those learned persons. It is to be regretted that several of the opinions (as stated on a former day) were prepared during the pressure of the circuit, and without sufficient opportunity of consulting the authorities bearing upon the different, and in some respects, intricate points which the subject involves. But though I regret this circumstance, it was, I have reason to believe, unavoidable.

Two questions have been raised: first, whether the proviso respecting the title of Marquis or Duke of Bridgewater is a condition precedent or subsequent; and secondly, whether the proviso is valid, or is to be regarded as against public policy, and therefore void.

As to the first and more technical question, it is I think admitted, and cannot indeed be disputed, that the will has been drawn with much care and attention, by a person obviously well acquainted with the force and effect of the *terms he employed, and not likely, therefore, to have misapplied them. * 156

The testator declares his will to be that, if Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater "to him and the heirs male of his body, then and in such case the use and estate thereinbefore directed to be limited to the heirs male of his body, shall cease and be absolutely void." These are admitted to be, in point of construction, and according to the constant usage of conveyancers, words importing a condition subsequent. The same words are uniformly used in different parts of the will as denoting conditions subsequent, and in cases where no other interpretation can be put upon them. In no instance are they used to express a condition precedent. In the previous passage of the will, the limitation of the uses and estates to Lord Alford and Henry Cust, and to the trustees during their respective lives, and to the heirs male of their respective bodies, is declared

to be "subject to the provisos for the determination thereof thereinafter contained"; and the use of the distinct word "determination" as to all these uses and estates indiscriminately, manifestly shows that the testator intended the conditions contained in those provisos to be, as to all of them, conditions subsequent. In like manner, in the proviso respecting the testator's brother being created Duke or Marquis of Bridgewater, the testator speaks of the proviso for the determination of the use or estate directed to be limited to the heirs male of the body of Lord Alford; and so also in the proviso immediately following relative to Earl Brownlow. It is further to be observed, that in the very clause in question, the condition is admitted to be a condition subsequent as to one part of it, although it is contended to be a condition precedent as to the other part. In a case of necessity, indeed, such

a difference of interpretation in the same clause might be
* 157 adopted, but a very * strong case must be made out to justify such a departure from the ordinary rules of construction.

The testator declares that the use or estate limited to the heirs male of the body of Lord Alford, shall, in a certain event, cease and be absolutely void,—words which, even in their ordinary acceptation, and without reference to any technical rule, denote exclusively a condition subsequent. The proviso has nothing of the character of a condition precedent. It is not said that upon the occurrence of such an event a use or estate shall arise, but that if such an event shall not have occurred, a use or estate previously limited shall be defeated. It does not create,—it determines and destroys. The will, in fact, consists of a series of limitations in favour of different persons and sets of persons, and the obvious meaning as to the point in question is, that if Lord Alford shall die without having acquired either of the suggested titles, the particular limitation in the series created in favour of the heirs male of his body, shall cease and be void,—the limitation is in effect to be struck out of the series and the next limitation in favour of Henry Cust is to be advanced,—but then it is upon a condition, which, if invalid, can have no operation.

But, my Lords, it is said, and not improperly said, that whether a condition is to be construed as precedent or subsequent must depend on the intention of the testator to be collected from the whole instrument; that no particular form of words is absolutely

necessary to express the one condition or the other, and that the most strict technical words or form may bend to the clear and manifest intention of the testator. But far from the intention of the testator, to which I shall presently advert, being at variance with the terms used, according to their natural and legal construction, it appears to me that the case is just the reverse. The fallacy, if I may so speak, which has led to the forcible *conversion of the words importing a condition subsequent in this case into a condition precedent, seems to be this, namely, that a condition subsequent is not properly applicable to the limitation of a contingent use or estate. But such a use or estate is an interest recognised by the law, and not unfrequently of great value; and there is no more inconsistency in making it subject to a condition subsequent, by declaring that if a certain event shall not have occurred, the limitation shall determine or cease and be void, than if it were an interest vested or in possession. If the law allows such a limitation to be made, such an interest to be created, it follows, as of course, that it may be vacated or determined. It is clear that the framer of the will considered it as no objection to the effect of a condition subsequent, that the use or estate limited was contingent, since he expressly provided that the use or estate in this instance, which he must have known to be contingent, should, upon the failure of a certain event, cease and determine.

It is also, my Lords, to be observed, that in the clause respecting the name and arms the testator declares that if the person entitled, &c. shall refuse to take, or shall discontinue to use the name and arms of Egerton, &c., all such estates as shall be limited to the sons of such person in tail male, as for the time being shall be in contingency or suspense, as the case may happen, shall "cease, determine, and be void"; thereby expressly stating that a use or estate, which is described in terms as being in contingency, shall cease and be void. And here I may remind your Lordships that one of the learned Judges, though his opinion in the result is unfavourable to the appellant, Mr. Baron Alderson, after adverting to the words "shall cease and be absolutely void," observes "that they must be allowed to be very strong words, indicative of an intention on the part of the *testator that the heirs male of the body of Lord Alford should in some way or other first take the estate, and, on the contingency occurring, lose that

which they had before taken; and, in such a case, the words would be to be treated as a condition subsequent."

Then with respect to the intention of the testator, as it is to be collected from the whole of the will. Did he intend that the condition should not operate as a condition subsequent, according to the plain and obvious meaning of the words (for this is what is contended), but, on the contrary, as a condition precedent? He was not *inops consilii*, and we cannot assume that he did not know the effect of the terms that he used. Then how would they operate? If the testator considered, as I think it reasonable to conclude he did, that the proviso was legal and binding, his intention would be equally affected whether the condition was precedent or subsequent, and it would, therefore, not be necessary, upon this supposition, and in order to effect that intention, to do the violence which is attempted to the language and form of the condition. If he was mistaken in this respect, that is no reason for altering the plain words which he has used, and introducing other terms in order to give effect to what may be conjectured as to the disposition he might have made of his property had he been aware of the legal obstruction to the execution of his wishes. If we are to indulge in what I must consider as misplaced conjecture, I should think it not reasonable to suppose that he would, if the object he had in view could not be legally accomplished, and by no failure or default of those whom he intended to benefit in the first instance, desire that the estate should go over and be enjoyed by those who were the more remote objects of his bounty. For the same reason, if the testator entertained a doubt as to the legality

of the proviso, it is not unreasonable to suppose that he *160 would, as *the safer course, have made the condition a condition subsequent rather than a condition precedent.

There appears to me then to be no sufficient reason, founded upon any supposed intention of the testator, to do violence to the words that have been used, and that they should therefore be interpreted according to their plain technical as well as ordinary sense, that is, as denoting a condition subsequent.

The second point to be considered is, whether the proviso is at variance with public policy, for if so, and the condition is a condition subsequent, then the result will be the same as if no such proviso had been contained in the will; but otherwise if the condition be a condition precedent. This is not a technical ques-

tion, but must be considered on general principles, with reference to the practical effect of the condition, and we must bring our observation and experience to bear in determining it.

It is a well-established rule of law that a condition against the public good, or public policy, as it is usually called, is illegal and void. Sheppard's Touchstone and Lord Coke are direct authorities on this point. In more modern times we find Lord Hardwicke, in a case already cited by the Lord Chief Baron, stating that "political arguments, in the fullest sense of the word, as they concern the government of a nation, must be, and always have been, of great weight in the consideration of the Court; and though there may be no *dolus malus* in contracts as to other persons, yet if the rest of mankind are concerned as well as the parties, it may properly be said that it regards the public utility." And in another case he says, "These reasons of public benefit and utility weigh greatly with me, and are a principal ingredient in my present opinion."

It is unnecessary to cite other authorities in support of this well-established rule of law. What cases come within

*the rule must be decided as they successively occur. *161
Each case must be determined according to its own circumstances. When the case of a trustee dealing with his *cestui que trust* was first considered, it must, in the absence of precedent, have been determined upon weighing the public mischief that would arise from giving a sanction to such dealing. So as to transactions between attorneys and their clients; also as to seamen insuring their wages, and other similar cases, referred to in the course of the argument. The inquiry must, in each instance, where no former precedent had occurred, have been into the tendency of the act to interfere with the general interest. The rule, then, is clear. Whether the particular case comes within the rule, it is the province of the Court in each instance, acting with due caution, to determine.

My Lords, the duties incident to the peerage (and Lord Alford might at any moment, by the death of Lord Brownlow, have become a peer) are of the gravest and highest character; and in the proper discharge of them the interests of the Crown and the public are deeply concerned. These duties are both legislative and judicial; in addition to which, a peer of the realm has a right, when he deems it necessary, to demand an audience of the sover-

eign, and to tender his advice respecting public affairs. In the framing of laws it is his duty to act according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, and least of all by those of a pecuniary nature. He acts judicially, not merely in the appellate jurisdiction of the House, but also in the various matters usually referred to committees, in which the strictest independence is to be observed, and all foreign influence of every description to be carefully avoided. Such is the position and such are the duties of

a peer of the realm, and it follows that any application or

*162 * disposition of property which has a tendency to interfere with the proper and faithful discharge of these duties must be at variance with the public good, and consequently illegal and void.

It is true that creations of peers and promotions in the peerage emanate from the Crown, and the respect we entertain for the Sovereign will not allow us to suppose that, in the exercise of this, or any other prerogative, he can act otherwise than according to the best and purest motives. But we all know that practically this power is exercised according to the advice of the minister; that the Crown rarely exercises it, except at his suggestion and on his recommendation; and further, that these honours are usually granted, except in cases of extraordinary merit or distinguished public services, to the partisans and supporters of the administration for the time being, and seldom to its opponents. This is obvious to all, and confirmed by every day's experience. What, then, would be the practical result of this state of things with reference to the proviso now under consideration? If an estate, in this case of great extent and value, is made to depend upon a creation or promotion in the peerage, is it reasonable to suppose, speaking generally (for we must so consider the subject, and without reference to particular individuals,) that such a state of things would not have at least a tendency to lead the party thus interested to act, and without much inquiry, in accordance with those who could insure the permanence of the estate to his descendants; to induce him to support their opinions and measures without any very scrutinizing regard as to their effect or propriety; and thus to affect that free agency which it is a duty, as far as possible, to keep unimpaired? That there may be exceptions, honourable exceptions, to such an influence, I do not mean to doubt. There may also be individuals who, from the dread of being sup-

posed to be *swayed by such motives, might adopt the *163 opposite course, which would also be liable to objection. But, taking mankind as we find it, we could not, without wilfully closing our eyes and discarding all the results of our observation and experience, come to the conclusion that such a position would not have a tendency, and, in some cases at least, a strong tendency, to produce the result which I have stated, viz. to fetter the free agency of the party in the performance of the important duties incident to his position as a member of the peerage ; and it follows, I think, that a proviso or condition which has a tendency to produce such results must be at variance with the public good and general welfare. It is admitted, that any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void. The character of the Judge, however upright and pure, does not vary the case. No less strong must be the principle when applied to the important duties of legislation, and to those judicial duties of the peerage upon which so many and such vast interests depend.

In the decision already adverted to, as to the insurance of the wages of a seaman, the only principle upon which it proceeded was, that such a practice, if permitted, would tend to relax his exertions for the safety of the ship, and thus affect the proper performance of his duty, in the faithful and active discharge of which the public interest is concerned ; and so in other instances which have been mentioned, and to which it is not necessary more particularly to refer. Each case must, as I have already stated, be decided upon its own circumstances, as applied to the established rule of law regarding the public interest and welfare, or, to use the words already quoted of Lord Hardwicke, "upon political arguments in the fullest sense of the word, as they concern the government * of a nation." It is true, and cannot be *164 disguised, that other motives, such as love of power, eagerness for office, &c. may, and undoubtedly do, more or less, influence the conduct of men in the performance of these various and important duties. But if cases exist which are beyond the reach of the law, they afford no reason why, when a further influence is attempted to be created by an unusual disposition of property, and Courts of justice are called upon to give effect to such disposition, they should not refuse it their sanction. The question, then, is, whether a proviso such as we are considering would have,

if acted upon, a tendency to influence improperly the performance of those duties to which I have referred. I think it would have such a tendency ; and I consider it, therefore, to be against the public good, and consequently illegal and void. Other objections, some of them of a more refined nature, may be urged against this proviso ; but I am not disposed to enter into further detail, as there are several noble Lords present of great learning and experience, who have given much of their attention to this case, and are prepared to state their opinions upon it.

For the reasons, then, which I have thus given, I think, but not without some hesitation, considering the respect due to those learned persons from whom I have the misfortune to differ, that the judgment in this case cannot be sustained.

LORD BROUGHAM.— My Lords, the conclusion at which I have arrived, but not without some hesitation, from the respect which I entertain for the opinions of the learned Judges with whom I have the misfortune to differ, is, that the judgment cannot be sustained.

The decision of this case must depend upon two points,
* 165 — * the effect of the proviso respecting the dignity, and the legality of that proviso. If the proviso makes the acquiring of the dignity a condition precedent to the estate tail in remainder, that remainder never could arise, and the legality of the proviso is immaterial. If the proviso only avoids, or makes to cease, the estate tail, in any way created or existing, then this estate is only destroyed if the proviso is legal.

1. It appears quite impossible to doubt what the frame of this proviso is, what were the intentions of the testator, and what were the pains taken by the well-skilled conveyancer who drew the will, to give those intentions expression and effect. The remainder is to the use of the heirs male of Lord Alford's body, — not, if he shall, or provided that he shall, or in case he shall, acquire the dignity, but without any such condition or contingency. Then follows a general declaration or provision subjecting the uses and estates so limited to Lord Alford and the heirs male of his body to "the several provisos for the determination thereof hereinafter contained." So that the remainder having first been given without any condition, is subjected to a proviso for its determination, that proviso being afterwards inserted.

I observe some unwillingness to regard this proviso as properly a condition, whether precedent or subsequent, and it is said to be only in popular language a condition. I, however, incline to think that it comes properly enough within the description of a condition. It is a condition imposed upon Lord Alford,— he is to acquire the dignity, and the impossibility of his doing so, were it admitted to the fullest extent, would not make it the less a condition. A gift to A. for life, remainder to B. if A. shall go to Rome in three hours, would prevent the remainder from ever vesting or even existing, and would so operate as a condition precedent. It is, however, of no consequence to * the present * 166 argument,— to the point I am now dealing with, whether we take it as a condition or as a circumstance, or event, or generally as a contingency. It may be of more importance as to the other question, that of legality, though I shall take it only as a contingency, which it clearly is, whether a condition or not.

The use or estate, then, which had been limited without any words of condition or any words importing contingency at all, is declared to be subject to the proviso, not for annexing a condition or contingency to the use or estate coming into existence, but for working a “determination” of that use or estate; and then we have the proviso thus referred to on the decease of Lord Alford without having acquired the dignity, “the use and estate hereinbefore directed to be limited to the heirs male of his body” (and as I am now dealing with it not as executory, I will leave out the executory words), “the use and estate hereinbefore limited shall cease and be absolutely void.” The proviso thus answers, and most exactly answers, the description given of it in the preceding clause in which it is referred to prospectively, the clause which subjects the uses and estates before limited to the after-mentioned proviso. It is most truly a “proviso for the determination thereof.” So, when, in the jointuring clause, the proviso is retrospectively referred to, the same expression is used; the uses are said to have been “determined and made void by virtue or according to the provisos.” If it be contended that the words, although denoting cesser, avoidance, destruction, may possibly mean also prevention, preclusion, causing non-existence as well as destroying existence, we may then look to the other provisos, if any can be found, in which the same expressions are used, where there is only

one possible sense imputable to them,— and accordingly, we find this occurs twice over. If Lord Alford shall become Earl

* 167 Brownlow, and shall * not within five years acquire the dukedom or marquisate, all uses limited to him, to trustees to preserve contingent remainders, and to the heirs male of his body, “shall thereafter” (that is, at the end of five years) “cease and be absolutely void, and the real estates go over as if he were actually dead without issue male.” Now this is clearly, and without any possibility of question, a cesser, a defeasance of a particular estate vested in possession, and of a remainder expectant on its determination, and no doubt whatever can arise that here the words import a condition subsequent. So the power of jointuring is given, and if Lord Alford at any time during his life shall execute it, the jointure so made, or covenanted to be made by him, shall “cease and be void if the uses and estates shall be determined and made void by the aforesaid proviso”; the jointure is, “thenceforth to cease and be void,” that is, from and after the determination and avoidance of the uses and estates limited to Lord Alford, and of the estate tail to his issue. It is quite undeniable, therefore, that, in these two provisos, condition precedent is out of the question; there is a condition subsequent only. The estate to Lord Alford, and the remainder to the heirs male of his body in the one, the jointure given to his widow in the other, are to cease by his not having acquired the dignity,— to cease, by the one proviso, after his own estate had become vested in possession, and, by the other, after he had executed the jointuring power.

It is said indeed, that the condition may be subsequent as regards the one limitation, and precedent as regards the other; and for this somewhat violent construction the reason is alleged that the proviso was so framed as to meet either of the two contingencies, the death of Lord Alford without having acquired

the title, and his becoming Lord Bridgewater and not * 168 obtaining it in five years; and this, it * is said, explains and justifies the use of the words, that is, their use in both cases. But really, this is not so; for the part of the proviso which relates to Lord Alford’s decease, might have been framed in words importing a condition precedent, as that no such use or estate should be limited to the heirs male of his body, instead of a direction that it should cease and be absolutely void; and then the use and estate both to himself and his issue male would have been

directed to cease and be void from and after the five years. Indeed, it is quite plain that the two provisos are separate and independent; they refer to different estates, the one to the estate tail, the other both to the estate of Lord Alford and the estate tail; they relate to different periods, the one to the death of Lord Alford, the other to the expiration of five years from his succeeding his father; and the word "thenceforth," which only refers to the last antecedent, "end of five years," has no application to the former part of the proviso, which is complete in itself. The concluding part as to the estates going over, applies to both; and accordingly it says "in either of the said cases," so as to leave no doubt of the deliberate intention of the framer of this will.

Then must it be said that there is no estate existing to which the words of cesser can apply? The limitation to Lord Alford with remainder to his issue male as purchasers, may possibly be regarded as an entire limitation, and taking effect in Lord Alford's life, so that the condition subsequent could operate upon it. Without denying that this is a possible view of the matter, it may be said that we are not driven to it in order to give the proviso the effect which it plainly was framed to have, as contemplating a contingency that should determine an existing estate. For there would, independent of Lord Alford's estate, be an existing remainder, contingent indeed, and in two ways contingent,
* both contingent during the particular estate and subject * 169
to the further contingency of the dignity not being acquired;
a contingency which, if operating by way of condition precedent prevents the remainder from arising; if operating by way of condition subsequent destroys that remainder, or causes it to cease.

The difficulty arises from the negative nature of the condition. If it had been a remainder expectant on the determination of the estate and to cease and be void if Lord Alford obtained a certain dignity, there could have been no doubt or difficulty about it. But even the consideration that the estate should cease the instant of its coming into existence does not appear to import any thing absurd or self-repugnant. It is not nearly so refined as the possibility of a seisin supposed in the well-known case of *Dillon v. Freine*,¹ in order to serve contingent and non-existing uses, and the suppositions made in some other cases in order to avoid greater absurdities or contradictions. The momentary nature or duration

¹ 1 Rep. 113 b.

of the estate may possibly be viewed as the result, the consequence, of regarding the condition as subsequent. I fully admit the nicety of the point. "We have an estate destroyed the moment it arises," say the supporters of the judgment below. "But there had been a contingent remainder in existence before," say the objectors to that judgment. It may further be granted, that we look in vain for cases in which this precise point has been considered.

On the other hand it must be admitted that if we are not at liberty to treat this as such a condition, no expression of the testator's intentions could have been sufficient to make it so considered. The same objection might have been urged even if he had said in terms, "I direct this to be taken as a condition

* 170 subsequent and not as a condition precedent," in * the same manner as he has superfluously intimated his will respecting the suspension of estates in the heirs male during the existence of the life estates. So that we are driven to admit that this must be a condition subsequent, unless there is a rule of law to prevent it so being, which will hardly be contended.

I have been treating this as a limitation of uses, as the learned Judges have been directed of course to regard it, and not a devise to trustees to convey to such uses. But having clearly ascertained the intention, I apprehend we are bound so to deal with the settlement, so to direct it being made, as will give that ascertained intention effect. If this can only be done by giving some estate on which the condition subsequent can operate, then we must give such an estate, as indeed certain of the Judges appear to have thought, — one, more doubtfully ; another, plainly and explicitly. Nor do I find that any one of those learned persons has a doubt upon the plain import of the words employed by the testator. None of them appears to doubt that he intended a condition subsequent, although most of them consider that, from such estate not existing, his words must be construed differently from his meaning.

My Lords, it is quite unnecessary to speculate upon the grounds of the testator's intention. It has been suggested that he may have said, "If I have a right to stimulate Lord Alford and thereby obtain the junction of the dignity with the property, I do so ; if I have no such right, then I shall not desire to exclude my nearest relations." But it is not safe to indulge in such suppositions ; it

seems by no means called for in this case ; and they may be open to objections derived from the frame of the will.

I also pass over the somewhat extraordinary results which might follow from the proviso in case it should be deemed legal and effectual. Thus the possession of the * estates might * 171 have been vested in one branch of the family for a great length of time in case Lord Alford had died, leaving a son, five or six years after the testator's decease, and without the dignity, so that the devises over might have taken effect ; but after twenty or thirty years, Lord Brownlow obtaining the dignity, the estates would have reverted to the issue of Lord Alford. Such consequences might follow whatever view we took of the condition, though more likely to follow from that condition being regarded as precedent. No such consequences can follow if it be considered as both subsequent and illegal. We are therefore brought to consider the second question, which only becomes material upon our deciding the first in favour of the condition being subsequent.

2. The proviso is, that if Lord Alford shall not acquire the dignity in his lifetime, the estates shall pass from the heirs male of his body immediately on his decease ; and that if he, having succeeded to the earldom of Brownlow, shall not acquire the dignity within five years, the estates shall pass from himself as well as from his heirs. The creation of Lord Brownlow, the father, as duke or marquis, with limitations to the heirs male of his marriage with the testator's niece, is declared to be equivalent to the acquiring the dignity by Lord Alford.

It is very possible that if the expression had been, not "acquire," but "be created," in the main proviso, the same consideration would have been applicable, knowing, as we do, the manner in which dignities may be conferred, in which they sometimes have been, always may be, conferred. But we are to regard the precise expression used, and by it plainly is intended the obtaining,—Lord Alford obtaining by his own exertions. If the testator had been asked whether he did not contemplate Lord Alford becoming a duke or marquis, either through the public services of his father, * thereby exalted, or through his own services in after * 172 life, he would in all likelihood have thought the question designed to turn him into ridicule. He would probably have thus regarded any suggestion, that, by leading an exemplary life, by strictly performing all the duties of his station, the father or

son might find himself raised in the peerage without further or more active efforts to aid his ascent. No one can seriously believe that the testator contemplated such a rise; that he had in his view any thing but a strenuous exertion to reach the desired height; that he attached the forfeiture of the estate to any thing but the want of exertion or the want of success, and rather to the former than the latter kind of failure.

And here, my Lords, I lay out of view the arguments urged, powerfully and not inappropriately urged, on the tendency of such conditions and family arrangements to interfere with the free exercise of the prerogative. My view is pointed in another direction. I look towards their manifest tendency to cause corrupt proceedings, to encourage attempts upon the virtue of one class of public servants, to lay snares for the integrity of another class. The Crown, indeed, must be presumed, not merely, as my noble and learned friend has said, from dutiful respect towards the sovereign,—I will not consent to rest it upon that ground,—the Crown is, in law, by *præsumptio juris et de jure*, incapable of being affected by any improper influence, a presumption of law which is not to be rebutted or averred against. That the Crown is the fountain of honour, and the sovereign incapable of giving a wrong direction to its streams, is an undeniable principle of the constitution, an undoubted position of law. But there is another, quite as irrefragable, which supersedes it and precludes its application to the present question. The sovereign can only act by the advice

and through the instrumentality of those who are neither
* 173 infallible * nor impeccable,—answerable indeed for all

that the irresponsible sovereign may do, but liable to err through undue influence, and to be swayed by improper motives. The proviso gives Lord Alford the strongest inducement to use the means of unduly influencing the dispensers of royal favour, and the will places those means at his disposal in an ample measure. A revenue of sixty thousand a year and upwards depends upon his obtaining the dignity; and that large income may be employed, with the influence of his rank and station to boot, in furthering the attainment of this end.

In these times no one will contend that the coarse form of naked bribery would probably be resorted to; but suppose the will had borne the date of 1678, instead of 1823, will any one pretend that the same improbability would have existed? Will any one affirm

that the very persons from whom some illustrious members of this House descend, would have withheld their influence over, I will not say the sovereign, but the ministers of the day, towards raising the devisee to the rank which their own progeny had attained ; or would have spurned a gift of much less than sixty thousand pounds to propitiate that influence ? If I go back half a century more than is necessary, it is because of a decided case at the earlier period ; I might have stopped at 1723, and suggested that the possibility would even then have been any thing rather than remote, of a skilful application of great resources obtaining a considerable advancement in the peerage, through certain favourites better known than respected. In those days — possibly of the first George, certainly of the second Charles — this would have been considered as within the bounds of no remote possibility. But surely it can hardly be maintained that the condition which would, on this ground, have been held illegal then, has become lawful now, in consequence of a change in the degree of probability that it might lead to corruption. The tendency is alone to be considered, and unless the possibility is so remote as to justify us in affirming that there is no tendency at all, the point is conceded. Gifts, bequests, conditions, contracts, are illegal from their tendency to promote unlawful acts, without regard to the amount of the inducement held out, or interest created, the position of the parties, or any other circumstances which go to affect the probability of the unlawful act being done.

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As I cannot regard the argument on improbability in this case, so neither can I the suggestion that such conditions may have respect either to lawful or unlawful proceedings, and that we are to presume that lawful only are contemplated. Suppose even that it had been said, "acquire the dignity by all lawful means," as was the Pierrepont case, but there are no such words here ; still, suppose there had been, this would make no difference, so long as unlawful means might be resorted to, upon lawful means failing ; for the encouragement to wrong-doing would still be held out, and it might be effectual notwithstanding the qualification adjected by way of guard. In that case it was very far from clear that the dukedom might not have been sought, and even obtained, without corruption, by "best, becoming, and lawful means," the expressions used in the will. The sum of ten thousand pounds, a sum at that time equal in force and effect to twice as much at the pres-

ent day, might have been judiciously employed to increase, and (the 49 Geo. 3, against buying seats not having passed) by lawful means to increase the Court's minority upon the Exclusion Bill; and no service would have been more gratefully acknowledged by the King and the heir presumptive, none more liberally rewarded. Yet the possibility of another use being made of the money, determined that great Judge, renowned alike for

* 175 sagacity and incorruptible integrity in * *fæce Romuli*, Lord Nottingham, to allow the demurrer and dismiss the bill, "for that it is against the law that such titles and honours, which are properly the rewards of virtue and merit, should be purchased by money." Can we doubt that if he had seen an estate of a hundred times the value made to depend upon obtaining a dukedom, he would have rejected the suggestion that this "title and honour" might have been sought after by "best becoming and lawful means," and that the use of none other was to be presumed? Enough that other means might have also been employed, and that even if the terms of the condition did not suggest, nay, though they excluded such a course, it yet easily came within the provision.

In later times the same disregard of the comparative probability of the two courses being taken has been evinced by the language of the Courts, the tendency towards the undue proceeding being held sufficient. In *Jones v. Randall*,¹ which was the case of a wager on the event of an Appeal to this House, and held to be a merely innocent wager, Lord Mansfield said that had it been with a Lord of Parliament it would have clearly been unlawful and void, and why? "On account of its mischievous tendency," says Lord Ellenborough, in *Gilbert v. Sykes*;² and yet, as was stated by his Lordship, "the danger of influencing these illustrious persons, who would not probably mix at all in the decision, was infinitely remote; but notwithstanding the improbability of any mischief in fact, it was void on account of its tendency upon general rules of law." Not only his Lordship in that case, but Le Blanc and Bayley, Justices, applied the same general rules on the same grounds, refusing to take into account the remoteness of the risk that assassination would be committed, or the policy of the

* 176 * state be interfered with. So in *Cole v. Gower*,³ where the

¹ Cowp. 37.

² 6 East, 110.

³ 16 East, 158.

Court was pressed with the argument that the security in question never could have induced the parish officers intentionally to let the pauper child perish, the Court said that on principles of public policy it could not allow them to acquire such an interest, whether they were likely to abuse their trust in consequence or not. My noble and learned friend referred to the established rule of law that seamen's wages are not to be insured, because of the tendency of such an interest to interfere with their duty. But no one ever seriously argued against this rule, by contending that a man's interest in the premium on the policy would be less powerful than his interest in saving himself from shipwreck.

The case has been put of a gift conditioned upon the party obtaining a living ; and the possible tendency of this to encourage simoniacal traffic has been supposed to be no impeachment of the gift. It is easy to put such cases in which a very trifling variation would certainly make the condition illegal, on that very ground ; from the somewhat anomalous state of our law respecting simony such cases may easily be suggested. But what shall be said of a bequest to all the adult males of a parish where sectarian feelings combined with political violence ran high, 10 per cent. to be paid down, the residue when A. B. ministering to a small minority of the people, should cease to be the rector ? There are parts of the United Kingdom in which A. B.'s life would not be insurable, though without doubt the parishioners might entitle themselves to the residue of their legacies innocently, by investing the 10 per cent. in the purchase of the next presentation to another living, or in obtaining from the incumbent the *resignation of his cure. But the possibility of a crime being committed, would make the condition at once be deemed illegal which had a tendency in that direction.

Thus far, touching the tendency of the condition to produce and facilitate attempts at obtaining the dignity by corrupt means,— attempts, it is admitted, unlikely to be made at the present day, and if made, still more unlikely to succeed. But there are other means of a far less guilty cast, and which are not to be rejected from our consideration ; for they are neither so unlikely to be employed, nor are they without great injury to the public weal. As the stern voice of prerogative has been said to be replaced by the gentler accents of influence on the part of the sovereign, so, on that of the subject, the ruder forms of corruption have assumed the less

repulsive features of intrigue. But as regards the duties and the functions of the Legislature, the law and constitution are inflexible; its members, whether by hereditary or elective right, are there only to consult *circa ardua regni*; and though in their corporate character they, like the sovereign, can do no wrong, individually they may be seduced or deterred from the due discharge of their office. Dignities are, in contemplation of law, to be bestowed for services or other merits. But they may likewise be sought by submitting to the personal views of a minister; by exerting the influence of property so as to affect elections; by using that property in a way that the law discountenances; or by guiding the conduct of the persons returned to Parliament; or by directing the course of those filling hereditary seats; directing it away from consultation for the interests of the realm and towards the attainment of the desired advancement. Now, in point of fact, it is as certain as the existence of Parliament, that the views of men are occasionally thus pointed, and their conduct guided by these motives.

* 178 * For examples of this we need not go back to the body which existed less than a quarter of a century before the date of this will, sitting in a House which a bystander, a dignitary of the Church, described as "half a bow-shot from the college," and where contracts were notoriously made for time, that is, political support hired out for a few important months, or even weeks, when some crisis gave each vote a high value; when, therefore, its skilful use might secure a step in the peerage,—a possibility, doubtless, which occasioned the same eminent authority to remark, that "the attitude of climbing and of crawling is the same." In purer times and places, the conduct of higher men, in both Houses of Parliament, has been notoriously all but avowedly shaped by the desire of obtaining a title or a step in the peerage. It is, therefore, idle to represent the condition which makes acquiring a dukedom necessary to preserving a vast estate, as only contemplating a bare possibility,—as not addressed to the parliamentary conduct of the party invested with the precarious possession,—as not likely practically and in fact to sway that conduct. But the law reprobates the yielding to such sinister motives, reprobates both the direction of that conduct in order to obtain the dignity, and the grant of the dignity in consideration of that conduct; and not only reprobates, but discourages, forbidding both the wrongful course and whatever has a tendency to-

wards making it be pursued. We are not, therefore, allowed to say that the party should not be presumed to seek the honour by undue means, or the dispensers of royal favour to grant it for reasons other than his merits. It is very possible that neither the one nor the other blame may be incurred ; that neither the individual nor the minister may swerve from the line of their duty ; it is even far from probable that either will ; but the law regards possible events not more unlikely than these ; and * taking security against the infirmity of human nature, * 179 regards the tendency as well as the act, and removes the motives to offending, that it may not have to punish the offence.

And truly, when we find such remote probability of abuse as amounts to a bare possibility made the ground of decision, the bare possibility of a peer being influenced by a five pounds' wager to decide a cause on which it was next to impossible he should ever sit in judgment, we may well take into our consideration the possibility of his political conduct, his voice upon questions of public policy, being biassed by the desire of obtaining the dignity which should protect himself or his family from ruin. Yet it is undeniable that the yielding to this bias is a plain breach of duty, especially in a peer, inasmuch as it is contrary to the exigency of the writ whereby he is summoned to attend and to deliberate. That the minister who, to reward such an adherent, prostituted the honours of the peerage, would be culpable, is not denied, but it is a guilt very far from unprecedented. In the present case, it would be all the more grave, because of the injury that it must work to the devisees over ; and accordingly, titles have been refused (I speak with official knowledge of this), even leave to change a name has been withheld, in order to avoid all preference of parties minded to act *ad captandum legatum*. But all this does not in any wise weaken — it greatly strengthens — the argument ; for it illustrates the tendency of such conditions to undermine the virtue of the complying minister, as well as of his unscrupulous partisan.

My Lords, upon these grounds I entirely agree with the proposition of my noble and learned friend, namely, to reverse the decree now under appeal.

The illegality of the condition subsequent renders it immaterial to consider the question of the jointure.

*180 * LORD TRURO.—I concur in the opinions which have been expressed by the two noble and learned Lords who have preceded me, that the judgment of the Court below ought to be reversed. The reasons which have led me to that conclusion are very much the same as those which have been stated by my noble and learned friend who first addressed your Lordships; and not having been previously acquainted with the contents of my noble friend's judgment, although I was apprised generally of its result, I trust your Lordships will excuse me if, in stating more particularly the grounds of my judgment, I should seem to be repeating much to the effect of what that noble and learned Lord has already better expressed.

Your Lordships are aware that Lord Bridgewater's will devises the estate to trustees, with a direction that a settlement shall be made embodying the limitations and uses mentioned in the will, including certain provisos for the determination thereof, inserted in a subsequent and distinct clause of the will. The first question which arises upon the proviso now in question is, whether it should be construed to have the effect of a condition precedent or of a condition subsequent.

This point becomes extremely important in the present case in reference to the second question which your Lordships will have to decide, that is, whether the proviso (which, for convenience has been called a condition, but which, correctly speaking, it is not), that the limitations in favour of the Brownlow family should cease in the event of the title of Marquis or Duke of Bridgewater not being acquired, is a proviso which the law will allow to bind the estate; and as it is possible that the legality or illegality of the proviso may in some degree influence its construction, for the pur-

pose of considering its construction I shall in the outset *181 assume that it is illegal, and shall reserve *any observations upon that point, until after my remarks upon the construction of the clause itself.

The following is the proviso to be construed. [His Lordship here read it.]

It may be convenient here to advert to the rules or principles of construction connected with the right decision of this case. Thus, the intention of the testator is the governing principle in the construction of wills; and this intention is to be collected from the whole will, and not from particular expressions or detached pas-

sages alone. But, on the other hand, in the case of trusts executed, such intention of the testator must be collected, not conjecturally, but from the language of the will itself; and words and forms of expression having a known legal import must be understood in their technical sense, unless it is to be collected from express words or by plain implication that they are to be understood in some other sense. And although, in the case of executory trusts, the Courts have, in certain cases, properly assumed a greater freedom in effectuating what appears to be the general intention of the author of the trusts, yet, even in the case of trusts executory, an intention must not be imputed by mere uncertain conjecture in contradiction to the express words; and especially where it is manifest that the will was drawn, not by a person who used technical expressions without knowing the meaning of them, but by a person well skilled in the practice of conveyancing. Again, although the Courts will frequently alter the position of words and clauses, and put other meanings upon them than those which they *prima facie* import; yet this is never to be done to give effect to an unlawful intent, nor in any case where such alteration or interpretation is not absolutely necessary. Moreover, where a gift is good in itself, but is followed by an unlawful or repugnant condition or qualification in a distinct clause, the gift is upheld and the * condition or qualification which alone is obnoxious is rejected. * 182

The first part of the proviso, which in terms purports to cause the cesser of the use and estate directed to be limited to the heirs male of Lord Alford, in case of his dying without having acquired the title of Duke or Marquis of Bridgewater, is in the nature of a condition subsequent, and not of a condition precedent. The proviso is not in the nature of a condition precedent,—no estate is to arise on its fulfilment; nor is it a conditional limitation properly so called, because, although it purports to defeat a use or estate, it does not create a new estate or interest in the room of the use or estate so defeated. Nor is it simply in the nature of a condition subsequent, because it not only defeats one estate or interest, but it proceeds to provide that the property shall go over to the objects of the ulterior limitations. In truth, it is what the testator himself designates it, a proviso for the determination of the use directed to be limited to the heirs male of Lord Alford; and it is also a proviso which thereby and by

express provision accelerates the subsequent estates or interests. It is similar in this respect to the proviso in the case of *The Earl of Scarborough v. Doe d. Savile*,¹ except that in that case the cesser was of a vested interest, whereas, in the present case, it is a cesser of a contingent interest.

But the first part of the proviso in question is in the form of a condition subsequent, penned in the regular technical way ; for it is annexed to an estate or interest created by a previous clause or previous part of the instrument ; and on the failure of the condition the use or estate is "to cease." Whereas, if it had been of

* 183 * the nature of a condition precedent, framed in the ordinary

more properly the introductory part, of the clause whereby the estate to which it is annexed would be created ; and upon the fulfilment of it an estate would arise. See Baron Rolfe's remarks in *Cooke v. Turner*.² It is also an important circumstance that this proviso is in the precise form of conditions in the same will, which are beyond all dispute of the nature of conditions subsequent. It is true that no precise technical form or position is essential to render a condition precedent or subsequent. If it can be collected from the will itself that the testator's intention was that the condition should be a condition precedent or that it should be a condition subsequent, it is to be so construed. I refer to the remarks of Justice Ashhurst in *Hotham v. The East India Company*,³ and of Lord Kenyon in *Porter v. Shephard*.⁴ The remarks of Lord Talbot in *Robinson v. Comyns*,⁵ properly considered, are not inconsistent with this statement.

As the proviso in question is in the regular form of a condition subsequent, and as it is in the very same form as the other provisos in the same will, which are unquestionably of the nature of conditions subsequent, the onus of showing that it was intended to be the very opposite of that which on its face it would appear to be,—that is, the onus of showing it to be a condition precedent, lies upon those who would put that construction upon it. As the use or estate was only to cease or be void on the given event, on the death of Lord Alford, before which time it could not vest, as it was to cease and be void before it had ever vested,

¹ 3 A. & E. 897.

⁴ 6 T. R. 668.

² 14 Sim. 503.

⁵ Cas. Temp. Talb. 166.

³ 1 T. R. 645.

it has been contended, and the majority of the learned Judges have adopted the position, that, by reason of the contingency, the words "cease and be void" can have no correct and * appropriate application to the use and estate referred to. * 184 It is said that the use and estate not being vested, it cannot cease and be void, and consequently the proviso cannot operate as a cesser or determination; and that, to have any effect, the proviso must be construed as a declaration that the acquisition of the prescribed dignity should operate as a condition precedent to any use or estate arising or vesting; in which case the legality or illegality of such condition precedent is immaterial. It has been assumed to be so clear that the proviso can have no operation as a cesser or determination of the contingent use or estate, that neither from the bar nor by the Judges has any reason, principle, or authority been mentioned or adduced in support of the point. It appears to me, that the learned Judges (owing perhaps to the little time and opportunity afforded them for research) have mistaken the common and ordinary examples of a rule, for an exact and perfect definition of it. I do not deny that the examples on which those learned persons would seem to have relied, may be in the nature of a condition precedent or subsequent, but I cannot assent to the assumption that they form the limits of the rules by which provisions of such a nature are to be ascertained.

This will, my Lords, is evidently drawn by a skilful draughtsman; numerous contingencies which might interfere to thwart or disappoint the testator's intentions or wishes are anticipated and provided for with a degree of ability and professional skill which, if correctly estimated, must induce great caution and mistrust in entertaining an impression or opinion that the draughtsman had adopted words which, although of known established technical meaning, were yet senseless and inappropriate in relation to the use and estate of which he was speaking, and were incompetent to produce the legal effect for which he used them, and, in * fact, rendered the proviso, as he framed and intended it, incapable of any sensible or legal construction. * 185 It seems to me that the expression here used is perfectly correct as applied to the gift or the interest made or created by the limitation; for a contingent gift or interest has an existence, capable, as well as a vested interest or estate, of being made to cease and become void. The vesting has nothing whatever to do with the question; it is

perfectly immaterial. In the one case, a contingent gift or interest exists; in the other case, an actual estate exists; the two things are very different, but each exists, and each may properly be made to cease and become void. And, indeed, a use *eo nomine*, though it be only inceptive, inchoate, or potential, may be properly said to exist, and to cease and become void, as well as a use clothed with the actual seisin, or, in other words, an actual estate. Who can deny that even a chance may exist, and a chance be made to cease?

My Lords, it may be admitted that it was the object of the proviso and the intention of the testator that the use of the estate to the heirs male of Lord Alford should not effectually vest at his death, otherwise than in the event of his having acquired the title of Duke or Marquis of Bridgewater. But it should be observed that that object and intention would be equally accomplished by construing the condition, if valid, a condition subsequent.

But it seems to be further contended, not only that such was the intention of the testator, but that the effect of the proviso was that, from the very necessity of the case, the use or estate to the heirs male of Lord Alford could not vest at his death otherwise than in the event of his having acquired the title of Duke or Marquis of Bridgewater; and that therefore the proviso, coupled with the limitation to which that proviso relates, virtually amounts

to two conditions precedent, such as these: "If Lord *186 Alford *should acquire the title of Duke or Marquis of

Bridgewater, then to his heirs male; but if he should not have acquired that title, then over"; which is what is commonly called a contingency with a double aspect; and that, consequently, the proviso, as regards the use to the heirs male of Lord Alford, is, in fact, a condition precedent, and attended with the incidents of a condition precedent.

This reasoning, however, appears to me to be fallacious, and little short of confounding things which are essentially different. For as the very learned editor of Gilbert on Uses (page 177) observes: "The distinction is very refined, but is certainly well established, that if an estate be limited to A. until B. return['] from Rome, and after B.'s return, to C., the limitation to C. is a good contingent remainder; whereas, if the estate is limited to A. for life, with a proviso that if B. return from Rome the estate shall

go to C., in this case the limitation to C., although precisely the same as the former in effect, is not a remainder, but what is generally termed a conditional limitation." The very affirmative words which have been constructively supplied in the present case, viz.: "If Lord Alford should acquire," &c. are wanting; we have only the negative words, "if he should die without having acquired," &c., which constitute a condition precedent in regard to the acceleration of the posterior uses, but a condition subsequent as regards the prior use to the heirs male of Lord Alford. Take the words as they stand, and then according to their *prima facie* and technical import; what the testator says is this, not that an estate to the heirs male is to arise on a given contingency, which would be a condition precedent; but that an estate previously directed to be limited to the heirs male should cease on a given contingency, which is a condition subsequent. As little are we authorised (I conceive) to supply the affirmative words above mentioned, *as we should be authorised to supply *187 the collateral limitation "until B. shall return from Rome" in the example just given of a conditional limitation by the learned editor of Gilbert on Uses. To do so would be to translate the testator's language into words of a different legal import, and thereby, as I shall presently endeavour to show, defeat instead of effectuate his intention. The mere fact that if the condition determines the use at all, it must determine it before ever it could vest even in interest, does not show that it was a condition precedent; it may virtually have the effect of a condition precedent in this respect, without being a condition precedent in its form, or of the nature of one, and without being attended with the incidents of a condition precedent.

My Lords, it appears to have been assumed that, according to the definition, and, indeed, according to the import of the very term itself, a condition, to be a condition subsequent, must necessarily be a condition to defeat a use or estate subsequently to its having become actually vested, that is, vested in interest at least. It is true, indeed, that ordinarily the use or estate which is defeated by a condition subsequent has become vested before the time when the condition defeats it; and it may be admitted, at least for the sake of argument, that one reason why a condition subsequent was so called, is that it is a condition which ordinarily defeats a use or estate subsequently to its vesting. But although

this may be one circumstance from which it may have derived its name, yet its nature is not necessarily restricted to the thing from which its name is derived. Although the condition may have received that name because such an operation is ordinarily incidental to it; yet even if this were the only reason why the condition was entitled a condition subsequent, that fact would not prove that in all cases the use or estate to be defeated must

* 188 *be actually vested before the condition operates. But

there is another reason why a condition subsequent may have received that name. A condition may be called precedent when it precedes, and because it precedes, the words of gift ; and a condition may be called subsequent when it follows, and because it follows, the words of gift, whether that gift is vested at the time when the condition (which follows it) is to operate or not. Regularly a condition precedent does in form precede, and a condition subsequent does in form follow the words of gift ; and in all cases a condition precedent does, in substance, and by construction at least, precede the gift, and a condition subsequent does, in substance and by construction at least, follow the gift ; for, if the gift is to arise upon a condition, such condition must in substance precede the gift ; and if the gift is to be defeated, or the use or estate is to cease or determine by the condition, such condition must in substance follow the gift : the gift in the latter case must have an existence antecedent to the operation of the condition which is to defeat it, or cause it to cease or determine.

For these reasons, my Lords, it seems to me that no satisfactory grounds have been shown for the position that a condition subsequent can operate only upon a vested estate or interest, or that a condition subsequent cannot operate to defeat a use or estate before it can vest, as well as an estate subsequently to its vesting.

But to get rid of the argument arising from the frame of the condition, it has been urged that this is not a case of a trust executed, but of a trust executory, that is, of a trust raised by a direction in the will to make a settlement to uses, or upon trusts which are indicated in such will ; and no doubt this is a case of a trust executory in that sense of the word, and that in the case of

a trust executory, a Court of Equity is in the habit of
* 189 directing *the property to be settled in such a mode as will best carry out the testator's intentions. See *Jervoise*

v. Duke of Northumberland;¹ Duke of Newcastle v. Countess of Lincoln.² But admitting all this, the onus still lies on the party contending that this proviso framed as a regular condition subsequent is a condition precedent, to show that, in reality, it was intended to be a condition precedent. How then is such an intention manifested, or on what grounds is it clearly presumable? I do not perceive any necessary or plain implication, any vehement or strong presumption, any clear or sufficient indication of such an intention. But I do see what appears to me to be perfectly conclusive ground for holding that an intention existed that this should not be a condition precedent.

Not only does the testator, or rather the skilful draughtsman for him, adopt the frame of a regular condition subsequent, but he designates the provisos embodying that condition, and the other conditions which are unquestionably of the nature of conditions subsequent, by one general term of "provisos for the determination of the uses and estates directed to be limited." The true character of those provisos is therefore described in the will itself. But independently of this, there are very strong grounds for negativing the presumption (if any existed from any other circumstances), that this is of the nature of a condition precedent. I conceive that probability, and reasonable and strong, if not vehement, presumption, are all in favour of the construction that this is of the nature of a condition subsequent. The will of the Earl of Bridgewater, although it may not be faultless, is yet admitted evidently to be the production of a gentleman well skilled in the law of property and in conveyancing practice. And it may, I *think, be fairly considered that he knew that the conditions he was instructed to insert were of questionable validity, and that he, therefore, very prudently and properly adopted a course which he knew to be safe with regard to those conditions, by making them conditions subsequent. But whether he knew this or not, one thing is certain, that the insertion of a condition subsequent was safe whether valid or not, while the insertion of a condition precedent would have been most mischievous, and subversive of what we may fairly presume to have been the most important designs of the testator. For assuming the condition to be bad, it would do no harm if subsequent; whereas, if bad and precedent, though in one limited view it might accomplish the

¹ 1 Jac. & W. 559.

² 3 Ves. 387.

testator's intent as regards the heirs male of Lord Alford; yet while the heir male of Lord Alford, though the prior object of the testator's regard, would lose his estate, it would go to those who were only secondary objects of his regard, and be held by them freed and discharged from the condition, which, in their case, would still be a condition subsequent, and which, therefore, if bad, would be wholly inoperative. This would be a consequence which it can scarcely be contended the testator contemplated.

The grounds on which I say that the condition in their case would still be a condition subsequent are these: the operation of the first proviso is made dependent upon a single circumstance, viz. the non-acquisition of the title by Lord Alford, during whose life the limitation to the heirs male of his body was necessarily contingent. But as regards the second proviso, relating to the heirs male of C. H. Cust, the operation of that is made dependent upon two circumstances, namely, the non-acquisition of the title by C. H. Cust (during whose life the limitation to the heirs male of his body would also be necessarily contingent), and also the non-acquisition of the title with certain special limitations *191 by Lord Alford, and which he might have *acquired after the death of C. H. Cust, and, consequently, long after the limitations to C. H. Cust's heirs male had become actually vested.

The distinction between the first and second provisos in this respect, or at all events, the consequences of that distinction as regards the defeating instead of effectuating the general intention of the testator, would seem to have escaped attention. The limitation to the heirs male of C. H. Cust is only contingent on account of the person. It is not contingent by reason of the second proviso relating to the acquisition of the required title. For it is a rule, that an interest shall, if it can consistently with other rules of law, be construed to be vested, either in the first instance, or as early as may be, rather than contingent; and the second proviso relating to the acquisition of the required title by Lord Alford or C. H. Cust, does not prevent the application of this rule, for that proviso (as far as regards the words of cesser) is not only capable of being deemed to be of the nature of a condition subsequent, so as not to interfere with the vesting of the limitation to the heirs male of C. H. Cust on his death; but so far as regards the words of cesser, it is in the precise technical form and

language of a condition subsequent, insomuch that to hold it to be of the nature of a condition precedent would be a gratuitous infringement of the rules of law, both as to the construction of conditions and as to the construing interests to be vested rather than contingent. Hence if C. H. Cust had died in the lifetime of Lord Alford, the heir male of C. H. Cust would have taken a vested interest under the limitations of uses, and notwithstanding the second proviso ; and in that case, if Lord Alford had not subsequently acquired the prescribed title, and C. H. Cust had not acquired it before his death, in the lifetime of Lord Alford, the second proviso would, as being in the nature of a condition subsequent, defeat such vested interest in the *heir male *192 of C. H. Cust, if such second proviso was legal ; but if such second proviso was illegal, the property on the death of Lord Alford would, by virtue of the first proviso (supposing it to be of the nature of a condition precedent, whether legal or illegal), go over from the heir male of Lord Alford, the primary object of the testator's bounty, and would vest in possession in the heir male of C. H. Cust, the secondary object of the testator's bounty, unaffected by the second proviso, as being of the nature of a condition subsequent and illegal, or by any condition whatever. Thus if the condition were bad, the only effect of holding it to be a condition precedent would be this : to cause the prior objects of the testator's bounty to lose the estate under an unlawful condition, because the dukedom or marquisate was not acquired by descent, and to give the estate to the secondary objects of the testator's bounty, though they might not possess the title, which it was equally the desire of the testator that they should possess, if they should become the owners of his property. This would be accomplishing a part only of the testator's intention, in such a way as to be utterly subversive of his real intention as a whole. For it can never be supposed that he could wish to take the estate in effect from the prior objects, and give it to the secondary objects of his regard, when the condition would be as unfulfilled by the secondary as by the prior objects.

I have considered the case as if it had been a question whether the words constituted a condition precedent, or a condition subsequent. But I have already intimated that in reality the proviso containing the contingency is neither a condition precedent nor a condition subsequent, but "a proviso of cesser and acceleration."

And whatever might be the true decision if this were strictly a question between a condition precedent and a condition

*193 subsequent, the case *assumes a very clear form, when it is considered, as it is in fact, a case of a distinct proviso of cesser and acceleration, even separated (though I need not lay any stress on that circumstance) by an interval of several pages from the limitations of the uses.

My Lords, the case thus considered resolves itself into this short form: First, there are certain limitations of uses; secondly, there is a proviso of cesser and acceleration of some of those uses. The limitations of uses are free from objection. The proviso of cesser and acceleration is alone the subject of objection. If that objection is well founded, if the proviso is invalid, the limitations of the uses remain unaffected by it. The gift being valid in itself, and the proviso which occurs in a subsequent part being alone obnoxious, such proviso must be regarded as struck out of the will. If it be said that the testator would not have inserted these limitations of uses, or would have varied them, if he had known that the proviso of cesser and acceleration was to have no effect given to it, I answer that that is a mere conjecture on which no Judge can act.

I may here observe, my Lords, that it appears to have been thought that the inoperativeness of a void condition subsequent, or of a provision of the nature of a condition subsequent, depends on the circumstance of its being annexed to a vested interest; but I apprehend that the reason of that inoperativeness is not merely the reluctance of the law to defeat vested interests, but the repugnance of the law to illegality, and the rule "that no provision (whatever may be its nature), dependent on any illegal event for its operation, shall have any effect." In concluding this part of the subject, I may here remark, that the opinions I have expressed, as to the nature and effect of the first proviso, are the conclusions

at which I have arrived, treating, as the learned Judges
*194 were directed to treat, the dispositions *in this will as

legal limitations. Considering them as executory trusts, I think the grounds for those conclusions would be still stronger; and if I had not been satisfied that the first proviso, so far as regards the words of cesser, is of the nature of a condition subsequent, and that the words "cease and be void" would be capable of having effect given to them, even if this were a trust executed, I should have taken the course suggested by one of the

learned Judges, Mr. Baron Alderson ; namely, to submit to your Lordships the expediency of considering the question as depending upon an executory trust.

My Lords, for the opinions of all the learned Judges I entertain a most unfeigned respect, and it is a subject of regret with me that those very learned persons have not had more time and better opportunities to form the opinions for which we have had to thank them. I know, from experience, too well what the duties of a Judge on circuit are, not to feel how fully they are entitled to the indulgence with which several of them have begged your Lordships to receive their opinions ; but I cannot forbear adding a hope, that this case will not be hereafter cited as a precedent for any Judge expressing an opinion, unless he is himself present, when there shall unfortunately be a difference of opinion among the learned Judges.

Upon the grounds I have stated, I have come to the conclusion, that the proviso is in the nature of a condition subsequent, and will operate as such, if legal, but if it be illegal, it must be rejected as if it were not contained in the will, and the gift will remain unaffected by it.

As to the legality of the condition embodied in the proviso : I have hitherto assumed that the proviso by which the limitation to the heirs of the body of Lord Alford is restrained from taking effect, otherwise than in the event of Lord Alford, during his life, obtaining the title of Duke or Marquis of Bridgewater, to be illegal and void, and I now * submit to your Lordships * 195 the grounds upon which I think the correctness of that assumption is established. In considering the question of the legality of the proviso and the inexpediency of unnecessary restrictions upon the free disposition of property by will or by any other means known to the law, it cannot be denied that such dispositions are subject to some limits and restraints, and that the law will not uphold such as have a tendency prejudicial to the public weal : every man is restricted against using his property to the prejudice of others. The principle embodied in the maxim, *Sic utere tuo ut alienum non laedas*, applies to the public in at least as full force as to individuals. There are other maxims equally expressive of the principle, *nihil quod est inconveniens est licitum*, and *salus reipublicæ suprema lex*. The principle I conceive to be universal, as governing as well transfers by deed as the validity of contracts and

dispositions by will ; I know of no text-book or case impugning this principle ; confusion occasionally arises from considering cases as establishing a principle, when they are, in truth, but instances of its application. It must be superfluous in this House to cite authorities to prove the existence of such a general law. It is to be found enunciated in our law-books from the earliest times, and by names of the highest authority in the law, by Lord Coke,¹ by Bracton,² and in Sheppard's Touchstone,³ which I believe is the work of Justice Doddridge, by Lord Hardwicke in *Chesterfield v. Janssen*,⁴ by Lord Kenyon, and Mr. Justice Lawrence in *Blachford v. Preston* ;⁵ and it has been acted upon in a great variety of cases, such as those of marriage brokerage bonds, restrictions

*196 upon trade, disability * of sailors to insure their wages, and sale of offices not within any statute. A case of this last sort was *Hanington v. Du Chatel* ;⁶ that was a case of security given as a consideration for having procured an office in the King's household, and Lord Thurlow expressed himself to the effect that it was "a matter of public policy similar to marriage brokerage bonds, where, though the parties are private, the practice is publicly detrimental." The same principle has been applied in cases of wagers respecting the public revenue, and numerous other instances. This principle has been expressed in different language, but in all cases to the same import as applying to matters contrary to law because against the public good.

Some criticism has been made in relation to the language in which the principle has been expressed ; exceptions have been made to the expression of "public policy," and it has been confounded with what may be called political policy ; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign states ; with all which, as applied to the present subject, it has nothing whatever to do. Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.

¹ 1 Inst. 206 b.

⁴ 1 Atk. 339, 352.

² Bk. III. fol. 100.

⁵ 8 T. R. 94.

³ Chap. vi. 132.

⁶ 1 Brown, C. C. 124.

I shall, therefore, assume that a disposition of property by will, equally with a disposition in any other form, which has a tendency injurious to the public interest or good, the law will not uphold, and the law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition; and if the law is *to be practically *197 applied, it cannot be administered with reference to the character of the individuals to whom the question may relate.

It has been said that this rule is too uncertain and vague to be capable of practical application by Judges, on account of the various opinions which may be entertained on the subject of public policy; but I think that that remark has no just foundation. There is no uncertainty in the rule that the law will not uphold dispositions of property and contracts which have a tendency prejudicial to the public good; there, no doubt, will be occasionally difficulty in deciding whether a particular case is liable to the application of the principle; but there is the same difficulty in regard to the application of many other rules and principles admitted to be established law. The principle itself seems to me to be necessarily incident to every state governed by law. Judges who are charged with the duty of seeing that dispositions and transactions are not upheld and enforced which are contrary to the spirit of the law, must be presumed to take care not to apply the law to doubtful cases, so as unnecessarily to interfere with transactions which are the subject of judicial investigation. It is true, as I have before said, that remarks have been made upon particular cases as calculated to impugn the principle, when the point of doubt has really been whether the circumstances of the particular case brought it within the principle.

The facts, of which the tendency to affect the public interest is to be determined in this case, are these: a vast estate is given, and the continuance and permanency of the gift is sought to be made to depend upon the event of a certain title of peerage being obtained. The object, as declared, being to annex the estate to the title required; and the question is, Has the hope of retaining an estate of *70,000*l.* a year by the acquisition *198 of the title referred to any tendency to influence the devisee to a conduct which may be inconsistent with his public duty as a subject, and prejudicial to the public good? This question relates to the tendency of the hope upon practical conduct.

Now, my Lords, the materials for arriving at a sound conclusion upon the question must be gathered from a consideration of the political and social state of the country. It will not be necessary to refer to history to ascertain the particular sources of influence by which the grant of peerages may have been obtained, or what change in those sources may happen at any future period. It is not necessary to inquire whether those of the year 1668, when the case of the *Earl of Kingston v. Pierrepont* occurred, in which a sum of 10,000*l.* was bequeathed to be employed in "all lawful means" to obtain a dukedom, which bequest was held to be void, may be identical with those of after times, because the principle of the constitution is, that a peerage should at all times be conferred with reference only to the character and circumstances of the individual elevated, and that pecuniary or any other influences, apart from those merits, ought not to be exercised or prevail. But the question must be determined by the tendency generally of the possession of such vast wealth being made dependent upon the acquisition of a peerage, or an elevation to a higher rank in it, to furnish motives calculated to influence the conduct of the devisee and to make him act upon motives independent of a sense of duty. The question is not affected by the character, or supposed character, of the individual who may be placed in such circumstances: the general tendency of being placed in such a situation is the point to be considered.

My Lords, in considering the question proposed, I do not
*199 think it proper or necessary to introduce the name of * the

Crown as the fountain of honour, further than to say that, constitutionally, the Crown is under no legal responsibility in relation to the exercise of its prerogatives, and that the Crown is esteemed never to act upon its own motion and impulse, but by the advice of those who are held responsible to the public for their due exercise. If the law is to be administered faithfully, the question must be considered with reference to the fact, that it is the minister of the day by whom and through whom, in substance, peerages are acquired. Let any one look through the list of creations since the commencement of the reign of George 3 and say if there are not instances (not to say how many) of elevations to the peerage of individuals whose public merits entirely eluded public attention, and whose elevations, whatever those merits might be, could only be ascribed to parliamentary or politi-

cal influence. Probably there are few persons with so little regard for their credit as to controvert the fact. With the exception of persons engaged in the public service, and of a very few other persons, has it not been the course for such patents to be conferred upon the adherents of the party in power or of the minister of the day, or have they not frequently resulted from parliamentary influence? However fortunate each minister may have been, in his turn, in the great merits and virtues possessed by his adherents and his party, yet many not very suspicious persons do not doubt that those merits would have gone unrewarded unless they had been associated with parliamentary power and influence. The possession of parliamentary boroughs and a large expenditure in aiding the election of party associates, have certainly not been unsuccessful in arresting the attention of the minister of the day to the merits of those adherents who were owners of the boroughs and expenders in elections. Those *who affect *200 to doubt upon this subject may arrive at a satisfactory conclusion by ascertaining what proportion of the peerages within the period I have mentioned, or of the advancement of the old ones, has fallen upon individuals not belonging to the party in power at the time of their elevation. Can it be said that, at the present day, no peerages have been acquired by the influence of party and parliamentary support? Does experience warrant the conclusion that the devise in question has no tendency to furnish a motive for public conduct independent of duty?

My Lords, in considering the effect of the hope of retaining the estate by procuring a higher title by an existing peer already charged with high duties of a legislative, political, and judicial character, can it be said that it has no tendency to influence him in his public conduct? Or in case of a commoner, to induce him to create and exercise a parliamentary influence, and regulate his conduct with views resulting from other considerations than the good of the state? Will it be asserted that motives much less cogent, though equally connected with personal objects, have not influenced political conduct on very important occasions? I repeat that what may occur in the particular instance is not the point; it is the general tendency. It has been said that the extent of the fortune should have no influence on the question; which, properly explained, can only mean that the degree or quantum of power to produce the evil referred to is not an ingredient

in determining whether the devise has a tendency adverse to the public good.

No advantage can result from putting a number of hypothetical cases which are supposed to have more or less analogy to the present. A difference of opinion may prevail in respect of each or many of the cases, as to their falling within the principle;

* 201 and to arrive at a correct * decision may require as much examination and deliberation as the case in question, and without any advantage to be derived from the result. The present case must be decided with reference to a general principle, but the particular circumstances of the case are the only safe materials upon which to determine whether the case itself is brought within the general principle. I cannot doubt that the testator was too well acquainted with the state of that society of which he was a member, not to know the ordinary means by which individuals of large fortune have been elevated to the peerage, whose situations were not very likely to afford the opportunity of performing great public service, and that he never supposed that Lord Alford was in a station likely to have the opportunity of distinguishing himself by the performance of any such public services as would be calculated to insure the reward of a marquisate or dukedom, however eminent the personal virtues and merits of that individual might be, and no doubt were. The means which the testator put within his power would enable him to display a merit quite as likely to procure the desired distinction as public services, that is, the merit of becoming a powerful and influential political and parliamentary supporter of the minister of the day. Many individuals would hesitate to express a confidence in their political independence and virtue, if such merits were to be followed by a loss of 70,000*l.* a year.

My Lords, I entertain the opinion that individuals ought not to be allowed to dispose of their property in any manner which furnishes a motive to conduct, in relation to acts of state, independent of a sense of right and duty. I can conceive no good motive to influence such a gift. It is plain that personal regard for the individual is not the only or even the principal motive for the gift.

I admit the object sought to be attained is not illegal. I * 202 also admit * that illegal or improper means need not necessarily be used to attain it. But I do not think that the testator could have contemplated any legitimate means by which it could

be acquired, and that he could have anticipated the use of any other means than parliamentary or private influence, obtained through the medium of the means which he should furnish. But the views or intentions of the testator in this respect do not, however, in my opinion, form material ingredients in the question. Giving credit for the purest intentions on the part of the testator, and the highest honour to Lord Alford and his parent peer, I think the tendency of the devise ought to prevent those considerations from influencing the decision, and that that tendency is to induce the individual to apply his wealth to the furtherance of his great object in a manner which others had found to facilitate the attainment of similar objects, and to political conduct, regardless of the proper motives which ought to govern it.

My Lords, the case of *The Earl of Kingston v. Pierrepont*¹ has a strong bearing upon the present. In that case 10,000*l.* were given to the Marquis of Dorchester and William Pierrepont, to be applied by them "by all lawful means" to procure a dukedom. Upon a bill being filed to set apart that sum, to be applied according to the will, the bequest was held to be illegal and void. It will be observed that the testator sought to guard his bequest from objection by directing the application of the 10,000*l.* to be "by all lawful means." But the Court held that no lawful and becoming means could be discovered by which the 10,000*l.* could be applied to enable him to procure that title. In that case the money was given to be applied to procure the title. In this case the estate is to be * retained if the title is acquired, and it is * 203 distinguishable from the case cited by the omission of any direction that the income to be derived from the estate should be applied to acquire the title. But I think the circumstance that the estate would be lost if the title should not be acquired, has such a tendency to induce the appropriation of the funds derived from the estate in endeavours to obtain the desired title, and to influence Lord Alford's conduct as a subject, as to bring the case within the principle of the decision cited.

My Lords, my opinion has been founded upon what I firmly believe is the just result of my experience of the present state of the political community which must be subjected to the operation of the proviso in question, and I cannot, when exercising the solemn duty of a Judge, deny or reject that experience in order to adopt

¹ 1 Vern. 5.

a sentimental theory of purity, which, in truth, is not applicable to the present, and as to which I doubt whether it was applicable to any former, or will be applicable to any future, period of the history of this country.

In conclusion, my Lords, I have to repeat that I think this restriction on the disposition of property being made dependent on matters of state, which furnish motives that have a tendency to affect the conduct of the object of such a disposition, as a subject, is not a restriction which can be deemed improperly or unnecessarily to interfere with the disposing power which the law has given. The caprice and fancy which may influence individuals, in regard to the disposal of their property, may have abundant scope for exercise, although not allowed to the extent of interfering with the public good. The power to regulate the disposal of property after death ought not to extend to the doing it in a manner tend-

ing to the prejudice of the living. And I think that to do
* 204 it in a manner which furnishes motives for * conduct, inde-

pendent of a sense of public duty, is a disposal tending to prejudice the living, and is such as the law will not uphold. And, upon this ground, I think the proviso by which the continuance of the limitation to the heirs of the body of Lord Alford is made to depend upon the acquisition of the title of Marquis or Duke of Bridgewater, is illegal, and being in the nature of a condition subsequent, that no effect can, by law, be given to it. And that, as the will contains a perfect separate limitation to the heirs of the body of Lord Alford, which character the appellant fills, full effect must be given to such limitation, and, therefore, that the decree which has been made in the cause must be reversed.

LORD ST. LEONARDS. — My Lords, as it is my fortune to address your Lordships last but one upon this occasion, I shall take care not to go over the grounds which have been already laid before your Lordships, but in which I may say at once that I entirely concur.

My Lords, the questions here are of great importance in point of law, — their importance in that respect exceeds even that which the case derives from the value of the property. The property, I take it in round numbers, may be considered as exceeding in value two millions of money ; but the questions of law are not less important, I am sure, in the estimation of your Lordships. I must

say that I, for one, shall never again accede to any representation, under any circumstances, to hasten, as we have hastened, under peculiar circumstances, the decision of this case ; for it has led to considerable inconvenience to the learned Judges, and has pressed upon them in the manner to which they have adverted in their opinions, and which, no doubt, has a tendency to take from those opinions some of * the weight to which, otherwise, * 205 they would have been entitled. If I differ in the result at which I arrive from those learned Judges, I must be considered to do so with the greatest possible hesitation, and with the greatest deference to opinions of which I know so well the value.

The questions, as it has been already stated, are two, — one upon the nature of the condition itself, whether it be what is called a condition precedent or a condition subsequent, and the other as to its legality or illegality. Now I look upon it to be of the highest importance to ascertain exactly what is the nature of the limitations, before we consider what are the particular provisions of this will. It seems rather late in the day to refer to first principles, but they lie in a few words, and they appear to me to be essential to the proper understanding of this case.

Under the common law, as your Lordships all know, you could not create such estates as are now created, you could not raise a fee upon a fee, you could not have a possibility upon a possibility ; you were so crippled and confined, that even if you could manage to create a determination of an estate by a condition, the heir at law alone could take advantage of it. The consequence of which was, that you could have no limitations over to a stranger, or to other persons, in the way that you now have, by way of shifting or secondary uses. When uses were introduced, the law was entirely changed, and you were enabled, by means of uses, which were founded originally upon trusts, to introduce all those modifications of property which are now so well known in the law of this country. It seems, with regard to the opinions of all the learned Judges, to be of importance to ascertain what a contingent use is, because they seem to think that that which does not exist cannot be defeated, and that I understand to be the ground of the opinion which they have delivered upon this first * point. Now, in point of fact, a use is a thing simply of * 206 confidence. If a man has a legal interest, which of itself is only a creation of the law, the law gives him the right to the

possession. But when you come to a use of or arising out of a legal estate, the use gives a right to the beneficial interest ; and the right to possession of the estate may be in one person, and the use or confidence in another. When, therefore, a man has a use, it is simply that there is a confidence placed in some person who has the legal estate, a confidence to permit him to have a usufructuary interest, that is, a thing which is simply a creation of equity. It is a thing which is not tangible, — it rests simply in confidence.

When the Statute of Uses came, and transferred uses, not into possession, but transferred uses into possessions, that is, made uses possessions, and gave to the equitable owner, to him who had the use or benefit, the legal estate, it was a simple transfer, by force of the statute, of the legal estate, which we call the seisin, to serve those uses. What did the contingent use then become ? It did not alter its character, except in this respect, that the legal estate was carried to it, and so it was made in that sense a contingent estate. Speaking of a vested estate, for example, it is a possession when before it was a simple use or confidence. But being coupled with the legal estate does not alter its character beyond this, that it was a vested equitable estate, and is a vested legal estate. Instead of the thing being vested simply in confidence, the legal estate formerly in another is conjoined with it. If the use be contingent, there is no variance ; the contingency is a thing resting in confidence, and when the time arrives for that contingency to take effect, the statute executes that use or confidence, and gives the legal estate. Why should it not ? Before it vests, it is a

* 207 limitation, and * it is a limitation of the use. What distinction can there really be in law as to the operation of defeating a confidence, whether it be a confidence to allow a person to enjoy an estate for the next ten years, or it be a confidence to allow me, if I go to Rome, for example, or if I have a son born within a certain time, to enjoy the estate from that period ? In either case it is a confidence. In the one case it is a confidence to be executed at once, and in the other it is a confidence depending upon a future event, but equally to be executed, and equally to be served out of the legal estate of the person in whom that confidence has been reposed. Upon the mere abstract question, Can a contingent use be divested, or not, before it actually takes effect ? I should say, Why should it not ? What is there to prevent you from saying, If a certain event arises I direct you to stand pos-

sessed of that estate upon confidence for A. B. C., and so on ? But if a certain other event should happen, I then tell you that that confidence is to cease, the trust is to cease, or the use, as we call it. The statute goes with and operates to give the seisin to all these uses, and they may all be determined precisely the same as vested estates. My Lords, I can have no doubt that a contingent use is a confidence, a trust, and therefore is an estate, first in equity, and then at law, but which, before the event arises, is just as capable of being defeated by a matter subsequent as any vested estate in the possession of any person.

Now, my Lords, the next point which it will be necessary to ascertain, before we come to the discussion of the very point before your Lordships, is, What is the nature of these provisions ? I am sorry to differ from my noble and learned friend who spoke second, upon that question, but my impression strongly and clearly is, that it is not a case of condition at all. These provisions may in * common parlance be called conditions to enable us * 208 to judge of their validity ; because conditional limitations, such limitations as the law now allows, have been imported into the law from the law of conditions, and therefore it is that what might be illegal as a condition may still be illegal as a secondary or shifting use ; and that what might be a precedent condition at law before the operation of the Statute of Uses, may still be a contingent limitation since that statute. My Lords, I apprehend that it is perfectly clear that this is not a case of condition at all, but that it is a case of contingent limitations, with a series of shifting or secondary uses, limited upon those contingent limitations.¹ Now that relieves this case very much from the difficulty that has been imported into it, in considering these provisos as if they were strict conditions at common law ; but, having regard to the different natures of the provisions, I am content, and must be content, to take the law of conditions as it stood as a precedent in this matter. I know, by the authorities which have been referred to, that conditions which were intended to defeat an estate have defeated an estate in contingency just as much as a vested estate ; that they are odious, as it is said, in law, and, as it is also said, by equally high authorities, the Institutes and Sheppard's Touchstone, that they must be submitted to a strict construction ; that is, you are not to give a favourable construction to a proviso, the

¹ See Clavering v. Ellison, 7 H. L. Cas. 718.

object of which is to defeat an estate already created; but that, if that estate is to be defeated, it must be so by clear and express terms, within the limits of the instrument creating it. So far, then, if this be a mere question of contingent limitations, we have to consider what are the limitations created by the will. I think one thing is perfectly clear, that we can only collect the intention of this testator from the words which he has used, and that

* 209 here, as in all * other cases, we are bound, if we can, to give the common meaning to every expression which we find on the face of the will. If you find that the expressions are vague, if you find that they are irrelevant, and that they are, as one of the learned Judges said, words, and only words, they will not prevent you from getting at the substance; but you must be satisfied, before you discard the ordinary meaning of language, or mould words to suit particular purposes, as the majority of the learned Judges propose to do in this case, you must be perfectly satisfied that you are called upon to mould those words, by taking them not in their common and ordinary import, and that by so doing you give them a meaning which expresses and effectuates the intention of the testator. You must give them the meaning which the testator had, and to which by law you may give effect.

My Lords, I would first, before I address myself to that point, call your Lordships' attention to the subject of executory trusts. If this could be deemed an executory trust, that construction would let in many arguments which would strike fatally at the view taken by the majority of the learned Judges. But, as I said upon a former occasion, when I stated my opinion to your Lordships, this is not a case of an executory trust; and I took particular care to draw the attention of the learned Judges to that question, and to state to them that their opinions were not asked upon that question. This House did not require the opinions of the learned Common Law Judges upon what was or was not an executory trust. The House had itself better means of deciding that point than fell within the reach of the learned Judges. But one of the learned Judges (Mr. Baron Alderson) has, although not asked the question, given his opinion that this is an executory trust. I am sorry to differ from that

* 210 learned Judge, but I am * clearly of opinion, and as strongly as a man can be upon any point, that this is not an executory trust, and I advise your Lordships not to treat it as

an executory trust, but to treat this will in all respects as if it had been a series of limitations of the legal estate.

Now, my Lords, with some knowledge of the proper mode of framing these instruments, I will take upon myself to state to your Lordships, that no legal instrument ever was prepared with a more perfect knowledge of the subject with which the draughtsman was dealing, and of the law bearing upon the different points, than this will exhibits in every part and portion of it. If the framer has miscarried with regard to the legality of the subsequent conditions, he has miscarried in very great company, and he would have no reason, if he were living, to be ashamed of any failure. He certainly has miscarried along with the very highest authorities, to whom the greatest deference must be paid. But there is no colour belonging to the trust of an executory trust, properly so called,—all trusts are in a sense executory, because a trust cannot be executed except by conveyance, and, therefore, there is something always to be done. But that is not the sense which a Court of Equity puts upon the term “executory trust.” A Court of Equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates? I defy any real-property lawyer to go through this will and draw a settlement, according to the intention of the testator, and yet alter a single word of the limitations for any *purpose whatever. They are right from beginning to *211 end. I do not speak now of the legality of the particular proviso, but I am speaking of the framing of the instrument, and I say that no lawyer, sitting down to frame that instrument, could do it more legally or more effectually than the framer of this will has done. I trace the hand of a master in every part of it. There are provisions with regard to vesting the heirlooms; there are provisions with regard to the vesting of chattels; there is a provision respecting his brother's debts, not giving his creditors a right over the fund. In short, in every page, and every part of this will, I see that the framer knew perfectly well what he was about. Now, if he did know what he was doing, what has he done?

He has introduced one of the most perfect series of limitations that the law enabled him to introduce. He has given to the testator's heirs of his body this estate in the first instance. His brother was resident abroad, and there are most elaborate provisions in respect of that residence. He gives him a certain interest, and provides for his heirs male, — but how does he provide for them? In the same way in which he provides for the heirs male of other parties. He then makes a provision for Lady Long, who was afterwards Lady Farnborough; and I beg your Lordships' particular attention to these provisions. The learned Judges have begun the will a little later, but I hold the earlier limitations to be of very great importance, as showing what is the true construction of this will. By his will he gives an estate, after his wife's, in remainder to Lady Long for ninety-nine years; then to trustees in the usual way, in trust to preserve contingent remainders; and then to her heirs male. Now there is a proviso afterwards inserted, that in case she has not issue male living at the time when the estate comes into her possession, then the limitation to her

shall cease and be void, and the estate shall go as if she
* 212 died * without issue.

At your Lordships' bar it was argued as if there was some difference of expression in that proviso as compared with the other provisos; but that is not so. There may be sometimes "determine" in one proviso, sometimes "cease and be void" in another, — equivalent words, but the expression is always the same, either "determine and be void" or "cease and be void"; there is no variance in the force and meaning of the expressions. Now, my Lords, just as we are passing, to try the point upon which I am about to enter, namely, what is the true construction of those limitations, and what contingencies you are to introduce, take that particular case. The words are, "to Lady Long for ninety-nine years and her heirs male." I may as well try the case upon the limitations to her as upon those to Lord Alford. A limitation, as we all know, to heirs male, is in its nature and from necessity a contingent limitation, because it only refers to the person who shall be the heir male of the devisee at the death of that devisee; but then it has this singular operation as a limitation, that although it cannot in the first instance operate to the first and other sons, and to them in tail male, but that the first person, the person who is heir male at the death of the devisee, takes it as a purchaser; yet when he does

take as purchaser, it has then all the qualities of a regular limitation, and the estate goes from one to another, in precisely the same way as it would have done if there had been a regular line of limitation. And, my Lords, the framer of this will was perfectly aware of that, for in the subsequent clauses, with regard to heirlooms, he speaks of the first and other sons taking. Let us try how we are to remodel the devise, because what the learned Judges propose is this. The limitation is of itself contingent without introducing any single word of contingency, and they propose in the other * limitations, up- * 213 on which the question properly arises, to introduce from the will new contingencies. They look to the subsequent provisos, and they take from those provisos a particular contingency, and they add that contingency to the contingency which is necessarily created and embodied in the very limitation itself. I do not know whether I quite make myself understood by your Lordships, but take this for example: the limitation to Lady Long's heirs male is in itself contingent, because it really is, in point of law, to the person who shall at her death answer the character of heir male of her body. If the learned Judges were to do with that limitation what they propose to do with the subsequent one,—finding that in case Lady Long, when she comes into possession of her estate, being in remainder, has not issue male then living, the whole is to be defeated, they would introduce another contingency, and they would say, if Lady Long has issue living at the time that her estate comes into possession, and also at her death. And why would they introduce that? Because they say, that the contingent limitation or use of the estate to her issue was a thing that had not arisen, and therefore could not be defeated; and although the conditional proviso is that it shall cease and be void, and the estate go over, they say that it is not possible to give that effect to it,—they are words and only words,—because the estate to heirs male never having arisen, it cannot be defeated; but the will made it a precedent condition that she should have issue male living at the time she came into possession. Now your Lordships will be aware that in the way in which the learned Judges look at this point, with the opinions which they have expressed upon the second point, it is to them wholly immaterial whether this is a condition precedent,—as it is called, and which I will call it also, simply for the sake of

* 214 following the argument, and not * because it is correct,— or a condition subsequent. What can it signify whether you introduce the contingency before the limitation, which shall prevent the limitation taking place, or you let it take effect *modo et forma* in which it is given, with a positive, clear, and distinct declaration, that upon a given event it shall cease? Suppose it to vest, where is the magic, where is the harm of its vesting? Suppose it to vest in the person who is heir male, let it vest, in the person who is so for the time, and it is then devested. It is but a momentary operation. My Lords, the law is so benignant in this country that the law sometimes contradicts itself in order to preserve estates. The very doctrine (and I beg your Lordships' attention to this) of conditions subsequent was introduced in favour of men's dispositions, and to save estates which might be prevented from arising by illegal conditions from the destruction which awaited them if the conditions were held to be precedent. Therefore, in that view, it is of the greatest importance to distinguish the real nature of that with which we are dealing. I take Lady Long's case, because it is so very simple, and because the estate was to cease upon an event which might happen in her own lifetime, viz. that she might not have issue living at the time the estate came into possession; and if you look at the words of the proviso, you will see that they are clear,— by this the limitation is a contingent limitation. And if you give effect to the will therefore in that respect, you must give effect to it as a contingent limitation to arise at the time of her death. Then there is a proviso which defeats it: now that proviso is strictly proper in all respects, it is a shifting or secondary use, because it defeats the previous limitation, and introduces a new estate in lieu of it. Therefore it is, what, upon the face of the proviso, it purports to be,— it is strictly a secondary or shifting use. Why *215 *should you not give effect to it according to the words?

You are in this dilemma, which, as I think, my Lords, the learned Judges have in no respect relieved us from, that in this very simple proviso to which I have referred in Lady Long's case, you would have to give to these words a double meaning, that is say, that, as regards Lady Long's own interest, it was a condition subsequent, as it is termed, and in regard to the issue, a condition precedent. Whereas, if you let this will operate as the owner intended it to operate, so as to let the limitations, if they

can, take place according to the manner in which they are given, and then let the other provisos operate in the way in which they by law can operate, and in the manner in which the framer of the will meant they should operate, and as I am bound to suppose the testator himself meant they should operate, they will be defeated if the events arise, and if the events do not arise, they will not be defeated. In this case, there is this most important consideration: if you will let the limitations take effect in their course and according to their order, in the way in which they are pointed out in this will, there are events, and very probable events, in which every one of those uses will take effect exactly as they are given, and not one of them will by any subsequent event be defeated. Are you to introduce contingencies in order to defeat those estates? I think, with the greatest submission, that the learned Judges have not met the difficulty; at least, the learned Judges have not at all relieved my mind from the difficulty when they introduce a particular contingency. Let us see, for example, when we are trying that, what the provisions are, and then see whether the learned Judges have or have not solved the difficulty which they have themselves created. After this proviso, as regards Lady Long's estate, you come to the provisos as to the dignities.

The first provides for the *two events, and it has been *216 treated as two provisos; it is only one proviso, and the latter part of that proviso overrides the whole of it,—if Lord Alford does not, in his lifetime or within a certain time, obtain the dignity to himself and his heirs male, or if the title of Lord Brownlow descends to him in his lifetime, and he does not, within five years, obtain a proper grant of the dignity, then and in either of those cases, &c.,—that is the proviso; the latter part of it governs both the preceding provisions, and hence it is only one proviso,—the estate to him, and to his heirs male, and to trustees, and so on, shall cease and determine, and the estate shall go over as if Lord Alford had died without issue. Now just consider that for a moment, while I pass on. Then the same provision is introduced as regards his next brother, Charles Henry Cust, now Egerton, and with this additional proviso, that if Lord Alford shall have obtained a remainder, which would extend to Charles Henry Cust, then that would introduce an additional case; but supposing he did not, then, and in either of these three cases, the estates, in like manner, are to go over. That is directed in the

clearest possible manner. Then come what have been properly called the equivalent clauses ; and I will show your Lordships presently the operation of those clauses, that if the brother of the testator obtains a grant of the dignity, which should extend to Lord Alford, for example, then the gift to the latter shall operate ; or, if Lord Brownlow himself, after the death of the testator's brother, obtains the dignity, that then the devise to Lord Alford shall operate. We shall see presently how that will bear. Then come two extraordinary clauses,—one, that if Lord Brownlow obtains a title which descends and which would interfere with the dukedom or marquisate, the limitations are to be void ; secondly,

if Lord Alford acquires by himself or otherwise any title

*217 (other than the dukedom) *the precedence of which shall

be greater than the marquisate of Bridgewater would be, that then the estate shall be void. These are two actually distinct clauses, repealing clauses ; I will not stop now to inquire whether they are legal or not, but observe what the learned Judges have done : they have taken, out of this series of complicated provisions, a particular case, namely, that of Lord Alford dying without acquiring the title, and then they introduce one express contingency upon the contingency which is necessarily included in the devise, and then they make it thus—

[LORD LYNDHURST.—That is only half the devise.]

That is only half the devise, as my noble and learned friend observes, but I will show your Lordships what besides. They take that particular case out, and introduce it without warrant of law, in my opinion, speaking with great deference to them, but certainly against the intention of the testator, and contrary to the frame of this will, they take a particular contingency out and read it thus,—that if Lord Alford should obtain the title of Duke or Marquis of Bridgewater in his lifetime, then to his heirs male at his death. My Lords, I pressed it upon the learned counsel at the bar, that in order to sustain that view of the case they must be prepared to show how every part of these various provisos can be introduced by way of contingent event, or precedent condition, if you like to call it so, by a contingency which, unless it happens, shall prevent the use from arising. But to take out that particular case, because the event has happened, is against every construction of law which ought to bind a Court of justice. You are not to look at the case, as it stands, at the moment when you are deciding it,

and pick out that particular case, and say, because this event has happened, such a construction is to be put upon it. The true * mode of construing men's wills is this,— take the * 218 whole instrument and ask what were the probable cases which might arise at the time that will was made; what were the probable events which were contemplated by the testator and provided for. If we are to do what the learned Judges suggest, no man can introduce contingent limitations with executory limitations over that will satisfy your Lordships; for every event must be provided for by a string of contingencies and qualifications. There is no reason why you are to introduce one contingency — we are now speaking of a contingent limitation — and leave out all the rest. Here the first contingency is, if Lord Alford shall not acquire the title, which provision does not disturb his life interest; but the next contingency is, "if he shall for five years be Earl of Brownlow without acquiring the other title": that goes to qualify and defeat his own interest. Then we come to the other cases, still keeping to Lord Alford; if Lord Brownlow acquired the title, that is a ratification of the devise, and that is a qualification. Therefore, suppose Lord Alford, for example, not to have acquired the dignity, we know that still his issue male might take under the will. But the other conditions must yet be allowed to operate. Why not take them, therefore, in their regular course and order? Supposing the brother himself to have acquired the title, there, again, is a ratification of the devise, and the limitation will take place. But the contingency proposed to be introduced by the learned Judges, in order to effectuate the intention of the testator, according to that view of the subject, would require to be qualified, moulded, and explained in a way that no man ever did intend when he created such a contingency. What would be the consequence? Why, that the framer of this will, who was master of his business, and drew the will in a perfectly legal manner, so as to meet that, and, I will venture to * say, every other contingency, in exactly the manner in * 219 which every one, who is really worthy of the name of a conveyancer (a name for which, I can assure your Lordships, I have very great respect), would have drawn that will, must be treated as having overlooked a most material set of circumstances.

My Lords, I have read over and over again every syllable of

this will. I have bestowed upon it the greatest attention in my power, and have felt exceedingly anxious about the determination of it, differing as I do from my noble and learned friend on the woolsack. I do so with great reluctance, when I consider that his opinion is supported by so great a majority of the learned Judges; and it really does require a very strong conviction to enable me to recommend your Lordships not to follow the opinions of those learned Judges. There is not a single proviso throughout this will that is not consistent with itself, and with every other part of the will; and if you attempt to dislocate it, and to convert provisos for cesser into contingencies, you produce all the mischief which I have pointed out, and do that which must lead to inextricable confusion. You may, no doubt, pick out a particular case which has happened, and say that that is a contingency, but you are not warranted in doing so in point of law. If you turn the provisos into contingencies, — in effect, conditions precedent, — it would be difficult to manage the gift over “and in default of issue male of Lord Alford.” It has not escaped observation that in every instance the testator has directed the estates or uses to cease in the given events.

My Lords, in this case there seems to have been a little misunderstanding. One learned Judge refers to *Carwardine v. Carwardine*¹ as an authority for importing words into a

* 220 condition. Your Lordships will find that * fully explained

in a book, which has been already referred to, — the last edition of Gilbert on Uses,² and you will see that that case does not bear at all upon the present. “A settlement was made to the use of the settler for life, — remainder to his intended wife for life, except in such cases as should be thereafter excepted for her jointure.” In a subsequent part of that settlement there was a proviso that if the settler had issue, that issue should have half the estate during the life of the wife; and what the Lord Keeper did in that case was this, — he introduced that proviso properly, where the exception was, to her for her lifetime, “except in such cases as should be hereinafter excepted.” He said, “Very well, I must look to see what is excepted”; and he took the exception that created a conditional limitation. She had the whole of the estate, if there was no issue living, and if there was issue, then the issue took one half, and she took the other half. That was all

¹ 1 Eden, 27; Butler's Fearne, 388.

² 3d ed. by Sugden, 173, note.

that was done in that case. My Lords, one of the learned Barons (Mr. Baron Alderson) seems to have imagined that this was a case turning upon the difference between a contingent remainder and an executory devise, for I see that that learned Judge states,¹ "As it is a rule of construction to give words, if they will bear it, the effect of creating a contingent remainder rather than an executory devise, when there is, as here, an estate to support it; this is the construction which, treating these as limitations at common law contained in a will, I should give to them." I think there is some misapprehension about that. This case involves no consideration of that rule. The very limitation itself is a contingent remainder. We are all aware that it is a contingent remainder, and not an executory devise. A gift is not more or less contingent,—a contingency is a contingency. The event upon which the *contingency depends may be more or less *221 probable, but you do not make the contingency more or less contingent. It is contingent, and that is the definition of it. But the event may be much more probable in one case than in another—Is it contingent? It is in point of law. This, therefore, is a contingent remainder, and the only question is, whether it is to be defeated by subsequent events, by a proviso which would operate to create a shifting or secondary use. The learned Judge would extend the rule which applies primarily to the creation of either a contingent remainder or an executory devise, to a shifting or secondary use, to which clearly it is not applicable. My Lords, one thing I think is quite clear,—my noble and learned friend who spoke last stated that in which I quite agree,—that a condition precedent or a condition subsequent can never be fairly varied or be rendered more or less operative, because a limitation is contingent. It matters not whether the limitation is vested, or whether it is contingent, for the question of condition precedent or condition subsequent depends upon intention; whether the one or the other, whether it be a contingent limitation or whether it be vested, is wholly indifferent to the operation of the rule.

My Lords, the great question upon this will, will be what I have before stated. If you leave these limitations to operate precisely as they are given, and to be defeated precisely as the testator has provided for their being defeated, every intention which the tes-

¹ See ante, p. 103.

tator ever had will be carried into effect, according to the rules of law, without altering a single word in the will. You will give to the language its natural import, and, moreover, you will give to the language its scientific and legal import; and it would be doing violence to the words to construe them in any other way.

I have already, I think, mentioned to your Lordships that * 222 it must be wholly indifferent as to the intention of the * testator, assuming him, as we must, to have considered all the provisions as legal, whether you prevent the use from arising, or whether you will allow it to vest for a moment, and then to be devested. But I will call your Lordships' attention to the care with which the law provides for the vesting of estates to save them from being destroyed. There is a remarkable instance in the old books, the case of *Plunket v. Homes*.¹ There the devise was to the testator's heir at law for life, with remainder over in contingency, and the fee simple descended to the heir at law, who was then the tenant for life. Now, your Lordships are aware that the union of a fee simple in reversion, with a life estate, would exclude and destroy the contingent remainder. What did the Court do when that case arose? It decided that, as the descent was immediate to the heir, there should not be that coalition in law between the reversion and the life estate which would exclude the contingent remainders, although it was admitted to be then the law, as it still is, that if the descent of that reversion had not been immediate, but it had descended to a third party, and from him to the tenant for life, the heir at law, the contingent remainders would have been excluded. That, therefore, is an instance in which the law actually intrenches upon its own settled rule, in order to save estates from being destroyed.

I have reserved, as regards this question, the authorities by which I wish to show your Lordships that, as I apprehend, the opinion delivered by the majority of the learned Judges ought not to be the rule of your decision; and the cases to which I am about shortly to call your Lordships' attention, you will find to be cases which, if the rule now proposed by the learned Judges had been adopted, must have been decided directly in an opposite * 223 * way; and yet there are no cases better established in law than those to which I refer. I will first mention a case in which the question was, whether a proviso should operate, by way

¹ 1 Sid. 47; and see Sugden's ed. Gilb. on Uses, 303, and 303, n. 2.

of condition, to defeat a legal estate, or whether it should operate so as to form a part of the limitation itself, and so save the estate. It is the case of *Page v. Hayward*:¹ "Nicholas Searle, by his will, devised to his niece, Mary Bryant and the heirs male of her body, upon condition and provided that she intermarry with and have issue male by one surnamed Searle; and in default of both conditions he devised to Elizabeth Bryant [in the same manner]; and in default thereof, he devised to George Searle for sixty years, if he so long live, remainder to the heirs male of the body of the said George and their issue male for ever." One of the nieces married a person who was not a Searle, and the question was, what was the effect of those limitations? "And by Holt, Chief Justice, and the whole Court, it was adjudged, first, that the estate devised to Mary was a good estate tail, and so was the estate to Elizabeth, but it is a special entail; it is an estate to her and the heirs male of her body begotten by a Searle, which is a middle entail, not the highest nor the least; for it might have been to her and the heirs of her body begotten by J. Searle, which had been more particular; yet this is a good estate tail within the statute *De Donis*, for it is within the reason of the statute. Secondly, the words 'upon condition,' &c., though they are express words of condition, shall be taken to be a limitation; so it is held in other cases. And Holt, Chief Justice, said, he saw no reason why they might not be so construed in a deed, though the law had not been carried so far; and so the sense is, if she has no issue by a Searle, upon her death the estate *shall remain over." In that case, therefore, the condition was so moulded as to form part of the limitation, and so to save the estates which had been intended to be created by the testator; whereas, according to the opinions which have been now given, I should understand that it would be read as an express condition, which would defeat the estate instead of allowing it to go as a description of part of the limitation of the estate, so as to save, as far as it might be, the devises in the will.

My Lords, there is a great number of cases which have been decided, where, although actual words of contingency are used, and limitations are introduced by actual words of contingency, yet, from the limitations over, you can come to the conclusion that the testator intended that the devisee before the contingency

¹ 2 Salk. 570.

had arisen should take a vested estate. Those cases, therefore, go infinitely beyond that now before your Lordships, because you are here asked, on account of a proviso providing for a subsequent event, to select a contingency, and to insert it where you do not find it. But the cases to which I am now about to call your attention are cases in which there was such a contingency expressed in the clearest words, and yet entirely upon the ground of the intention, that contingency was not, as here, interpolated and inserted without warrant, but was struck out of the will, and was not considered as a condition precedent, but as a part of the gift over.

My Lords, the first case is the well-known case of *Bromfield v. Crowder*.¹ There the testator devised to A. for life, and after death to B. for life, and at the decease of the two, he gave all his real estate to C., if he should live to attain twenty-one, but in case

he should die before attaining twenty-one, then he gave it
* 225 over. The * Court held that that last taker took the estate

at once from the death of the testator; though he was under twenty-one he took a vested estate at once, and the gift over was only to take effect in case he died under twenty-one. The learned Chief Justice, in stating the opinion of the Court, says:² “There is nothing in the will to prove that the testator meant the plaintiff not to take a vested estate unless he survived twenty-one; indeed, the true sense of the thing is, that the devisor meant him to take it as an immediate devise in himself, but that it was to go over in the event of his dying under twenty-one. It must be admitted that, according to repeated decisions, no precise words are necessary to constitute a condition precedent in wills; they must be construed according to the intention of the parties; and it would be absurd, considering the various circumstances under which wills are made, to require particular terms to express particular meanings. The apparent intention, as collected from the whole will, must always control particular expressions; now the fairest construction that can be put upon this will, independent of authority, is, that the plaintiff took an immediate vested estate on the death of the preceding devisees, with a condition subsequent.” My Lords, that case came to this House, and the judgment was affirmed;³ so that there the very contingency was

¹ 1 New Rep. 313.

² 1 New Rep. 325.

³ So stated by Lord Ellenborough in judgment in *Doe d. Hunt v. Moore*, 14 East, 604.

struck out of the will, and a vested estate taken directly contrary to the very words of the will itself.

That was followed by a case which was very much doubted at the time, — the case of *Doe d. Hunt v. Moore*.¹ The only difference between those cases is this, that the case to which I have already drawn your Lordships' attention * was the * 226 case of a gift in remainder, that to which I am now referring was a devise at once to "J. M. when he attains the age of twenty-one, but in case he dies before twenty-one," then over; and it was held that there was no distinction in law between the two cases, and that, therefore, the devisee took, although he had not attained twenty-one. The words of contingency are again struck out, in order to effectuate the intention of the testator, and that is directly, as it appears to me, opposed to the opinions of the majority of the learned Judges in this case.

My Lords, that case being deemed not quite satisfactory, the point was brought before this House in the case of *Phipps v. Ackers*.² There the case which was stated to the learned Judges was this: "The testator being seised in fee of estates situated in the parish of Wheelock, devised those estates in this manner: he gave those estates to George Holland Ackers when and so soon as he should attain the age of twenty-one years, but in case he should die under the age of twenty-one years without leaving issue, in that case the estates should form part of the residuary estate of the testator, which he gave over to another person; and the question put to the Judges was this, what estate George Holland took in the Wheelock estates"; — and their opinion was, that he took a vested estate. My noble and learned friend who spoke second doubted whether *Doe v. Moore* had been properly decided, yet he did not oppose the decision of this House, and that decision was in favour of the judgment of the Court below, and really sets this point at rest.

There was another case to which I shall now direct your Lordships' attention, — the case of *Aislabie v. Rice*.³ There was a devise in that case to the wife, and her assigns * for * 227 life, in case she continued single and unmarried, and after her decease, to such persons as she should appoint, by deed or will; and for want of appointment, over. But in case she should marry

¹ 14 East, 601.

* 3 Madd. 256.

² 9 Clark & F. 583. See also 3 Clark & F. 665, 702.

in the lifetime of other persons, with their consent, then she was to enjoy the estate for the whole of her life. Your Lordships will see, therefore, that the limitation was to her, for her life, if she should so long continue single and unmarried, but with a subsequent proviso, that if she married in the lifetime of the persons referred to, with their consent, she should have the estate for the whole of her life. Those persons died, and she married without consent; and the question was, what was the nature of the limitation? It was sent to the Court of Common Pleas,¹ and the learned Judges of that Court returned this certificate: "We are of opinion that this condition was a condition subsequent, and that, as the compliance with it was, by the death of Alice Hatton, and James Tierney, and Thomas Lilly, before the marriage of Hannah Lilly, become impossible by the act of God, her estate for life is become absolute, and that she may now execute the power of appointment"; and that was confirmed. Now if the case provided for had been allowed to operate as a part of the limitation, she would, of course, have lost the estate; but the Court held it to be a condition subsequent, and that the condition having become impossible by the act of God, the estate was not destroyed or affected, but remained: and your Lordships see, therefore, how anxious the Courts have been to prevent estates from being defeated by such conditions.

There is one other case to which I will call your Lordships' attention,—that of *Gulliver v. Ashby*.² There, the estate was devised to uses, and there was a condition by way of proviso, *228 that the party should take the name and *arms, but there was no devise over. There was a prohibition against waste, and the particular spot so protected was actually devised over. There was a little argument, therefore, upon that point, but the question was, what was the nature of the proviso as to taking the name and arms? Lord Mansfield said, "I am of opinion that this is not a condition precedent, and it cannot be complied with"; and he gives the reasons why he is of that opinion. It was argued very much that that portion of the proviso was to be taken in and form part of the limitation, just as the learned Judges here have recommended your Lordships to take in the contingent proviso and to insert it before the limitation. Lord Mansfield was clearly of opinion that that was not warranted by law; and he makes this

¹ 8 Taunt. 459.

² 4 Burr. 1929.

observation, "as to the question whether the condition was broken or not. In such a case (of so silly a condition as this is)," showing that the Courts do not look with very great favour upon such conditions, "the Court would perhaps incline against the rigour of the forfeiture," though a forfeiture had been incurred. Mr. Justice Yates says: "This is certainly not a condition precedent. The question then is, 'whether it be a conditional limitation.' I am clearly of opinion it is not. Doubtless it is not an express limitation; and an implication of one can only be made in order to effectuate the testator's intention, and must be a necessary implication to that purpose." He then says: "The Court will not make an implication to support an idle intention beneficial to nobody, nor shall such an implication be made upon a limitation after estates tail." He then says: "It cannot, therefore, be considered as a conditional limitation, nor is it a condition subsequent, for it would be nugatory; as Ambrose Saunders might immediately suffer a common recovery and bar the estate. It can only operate as a recommendation or desire." Mr.

* Justice Aston says: "Whether this be a condition or a * 229 recommendation, yet the rules of making implications do not hold in the case now before us. The cases cited in support of making the implication are founded upon reasons which do not exist in the present case. I take it to be a condition subsequent, and as such barred by the common recovery." My Lords, observe what another of the learned Judges said: "He concluded with saying that this condition, or whatever else it may be called, is not such a limitation as will carry the estate over to the next remainder-man upon breach of the condition enjoined." These cases seem to me clearly to prove what I have stated to your Lordships, that not only is the introduction of the contingency selected and culled out of the provisos not warranted by law; but that the law does in cases of infinitely more difficulty actually strike out positive contingencies, and give vested estates in order to effectuate an intention. In like manner, it refuses to take a proviso, the object of which was to impose a condition upon the parties, out of its proper place, and to insert it as a part of the limitation, which would go to defeat the estate. As these cases appear to me quite conclusive upon the subject, I have, therefore, come to the conclusion to recommend to your Lordships, with my noble and learned friends who have already spoken, and I do so with a perfect conviction in

my own mind that such is the law, — to hold that this, if it is to be called a condition, is a condition subsequent, and not precedent. I call it so, because it is a short way of expressing my opinion, — not because I look upon the proviso as a condition.

My Lords, you must, in looking at this part of the case, bear in mind the different events that might have arisen. If Lord Bridgewater's brother had acquired the dignity, and it had de-

* 230 scended to Lord Alford, every thing would * then have taken place regularly in its course. If Lord Brownlow had obtained the dignity and it had descended, the same operation

would have taken place, and the limitations would have taken effect in their natural order, without being in any manner disturbed. The diffrent complications which might take place, I have already referred your Lordships to, and I will not repeat them ; but looking at all these points, I am bound to say, as a real-property lawyer, the case is not one upon which I can entertain any doubt. I speak with great submission and deference to those who are more competent than myself to give an opinion upon it, but I am bound to state my clear and firin conviction and opinion, that this is in no respect within any principle of law which authorises your Lordships to treat it as what has been termed a case of a condition precedent.

My Lords, that introduces the next question, which has been so very largely debated, that I shall be as short as I possibly can upon that question. I agree with so much that has fallen from my noble and learned friends, that I shall not attempt to repeat what they have already so ably expressed. But there are some few points to which I wish to draw your Lordships' attention. If you take the case of *Kingston v. Pierrepont*,¹ as it is reported, it would seem to be a case in which the testator had intended by "lawful means," as he states, to obtain a dignity. But we have been furnished with the copy of an extract from the registrar's book of that case, by which it appears that he meant no such thing ; he meant any means, however unlawful, as I will show to your Lordships. What does that case prove ? Remember that this was a will openly made, a will that must necessarily be

brought forward, made by a person of great family, and
* 231 made * with the view of obtaining the highest dignity that could be obtained from the Crown ; and which yet did un-

¹ 1 Vern. 5.

blushingly provide for the purchase, by money, of the dignity in question. How was that followed up? A bill in equity was filed by the person who claimed to be entitled to have that money laid out in the purchase of the dignity, praying to have the trust executed, that is, to have the dignity bought. What conclusion do I draw from that? That at that period, such was the corruption of the times that nobody doubted that a peerage might be bought. But observe that, that attempt being defeated, nobody has, for 150 years, ever attempted to raise the question again till the Earl of Bridgewater raised it in this case. My Lords, it has often been said by sages of the law, and I think well said, that it is a good rule not to allow that to be done which has never been accomplished. We have had new-fangled schemes quite enough, without introducing more. The attempt at this day to introduce some novel limitation would fail, for you may depend upon it that it would contain some seeds of vice which would render it illegal. The wit of man has been tried, and the science of lawyers has come to his aid, to endeavour to frame limitations to gratify every possible fancy and every possible caprice; but during the whole of the long period to which I have referred there are but two instances, one of which I have mentioned to your Lordships, in which the parties thought they could, in a Court of justice, enforce the actual disposition of money to buy a peerage. And the debate was long, as the registrar's book tells you, before that case was decided. And then this case, for the first time, at the end of upwards of a century and a half, comes before your Lordships upon a similar point. What is the distinction between the cases, in the worst and vilest view of the matter, and looking at the infirmities of human * nature? That in the *232 one case it was unblushingly and openly asserted, intended, and expressed; and in the other case, supposing there was any such intention, the means are furnished of accomplishing the very same purpose, and the means furnished with such a pressure upon the man to whom those means are given, that it is too much, it is too great a trial of human firmness, or rather, I should say, of man's weakness, to expose him to such a temptation, and the law ought to step in to save men from such a temptation. What was the object of the Earl of Bridgewater? To annex his estates, as he tells you, to the title of Duke or Marquis of Bridgewater. How did he intend to accomplish that? By giving this immediate

vested estate, worth upwards of two millions of money, to a family with influence, possessing already a high dignity, and which would only make it necessary to obtain a step or two steps in the peerage ; and with such a pressure as that would create, he hoped that it would lead to the acquisition of the dignity. He imposed no such obligation on the Egertons of Tatton. My noble and learned friends have told your Lordships what has been done in former times, and I entirely agree that this case ought to be decided precisely as if it had taken place a century and a half ago. The law moulds itself to the wants and wishes, and varying exigencies of mankind, and properly so ; but the principles of law do not vary, though they may be modified in the application of them to new cases as they arise. The principle of law upon which these cases must be decided is precisely that which ought to have governed this House if the case had come before it at the time when the case of *Kingston v. Pierrepont* was heard in the Court of Chancery. Men are not to be allowed to accomplish indirectly that which they cannot do directly. They may not furnish pecuniary means

*233 (for these are illegal means) to a *devisee, which might further his endeavours to procure a peerage ; making the continuance of his interest to depend upon his success. No man should be permitted to hold out inducements which may lead to serious and fatal consequences.

I think it important, in a few words, to call your Lordships' attention to what was the real nature of the case of *Kingston v. Pierrepont*,¹ because it shows how necessary it is to be very careful in any rule laid down not to encourage dispositions of this nature. The will there appropriates "10,000l., to be employed by his brother, the Marquis of Dorchester, and William Pierrepont, both or either of them, or the heirs male of their family at the time of his death, by all best and becoming lawful means, to procure the title of Duke to the present head and successive heirs male of their name and family, provided the same were effected within the term of one year after the day of his decease." He thought that the dignity of a dukedom was to be had very readily, and he only allowed twelve months to obtain it, and 10,000l. I beg your Lordships' attention to this part of the will, in order to see what the intention of the testator was. "But if the said sum of 10,000l., or what they, concerned in the title, might or should add, could

¹ 1 Vern. 5.

not avail to that mentioned and appointed end,—the obtaining of the title,” then he gives the 10,000*l.* over. So that he says, “If you cannot with that 10,000*l.* obtain the title, my object will not be answered, and I give it over.” Then comes this important clause: “Further declaring that the said 10,000*l.*, or any part of it, was not to be, nor should not be, in the hands of the carriers on account of the designed procurement, but granted and secured to be paid when the wished title was really procured, and *satisfactory security given to his executor, and that within *234 a short prefixed time, it certainly should.” Your Lordships see, therefore, that he says here that the money is not to be given to the carriers, but it is to be secured well till the title is actually and positively got. The word “carriers” seems rather to have puzzled some persons, but it admits of a very easy interpretation. The word “carriers” there means the persons who should undertake to get the title, and they were not to touch the cash till the ducal coronet descended upon the brow of the person there named. A more unblushing and audacious disposition never was made by man; and that the parties entitled under it should dare to go into a Court of Equity and ask for the execution of that trust does show a state of things sufficient to alarm us, and it ought to operate as a warning not to let in, by the decision of your Lordships now, such dispositions in effect as that which was then struck at. There the matter remained up till this moment, and I hope that your Lordships will now, by your judgment, give a final and fatal blow to such highly improper dispositions.

I cannot help thinking that there is a great deal in the argument which was addressed to us from the bar, as to the embarrassment which such a provision as this would create in the Crown. Constitutionally speaking, I will not on this occasion sever the Crown from its ministers, but I will consider the Crown acting in the usual way, by responsible ministers. Then observe what it is that is desired. A particular dignity is pointed out, and particular limitations of that dignity are chalked out, and there is this pressure at least put upon the Crown, that a case of compassion is raised. Suppose Lord Alford was an infant when the testator made his will and provided for his infancy. Suppose, for example, the estate to have come to the infant Lord Alford, and suppose Lord Brownlow to *have died, and the Earldom of *235 Brownlow to have descended to Lord Alford whilst he was

an infant, then comes the clause that if, within five years, he did not obtain the dignity, his estate should go over to others,—an estate worth two millions of money. Now conceive the pressure that is put upon the Crown, the case of compassion which is made out. Will the Crown refuse the dignity to this family? Will it refuse one step more in the peerage, knowing that the consequence of its refusal will be that this vast estate will go from the person for whom it was provided in the first instance, and thus the object of the testator's bounty be frustrated. I say, my Lords, that it is an indignity, an insult offered to the Crown, that a man shall point out the particular title which he will have, and the particular limitations to be attached to that title; that he shall prohibit a party from taking any other title which should interfere with his view; that he shall insist upon what the Crown itself cannot accomplish, namely, as in one of the clauses, that the dignity to be taken shall have a certain precedence. The Crown of itself has not the power to do that which this ambitious testator desired to be accomplished. Is the Crown to be placed in that difficulty? Suppose I were to imagine that two sovereigns had already been compelled, in consequence of this very provision, to refuse a step in the peerage to give effect to this instrument, it would be no great stretch of imagination; and yet what can be more painful, when you look at the great pressure upon the party? It is a dangerous power to be placed in the hands of any man, with such a temptation to use it,—a temptation almost irresistible. God forbid that I should say there are not men who could resist it; but the temptation is more than you are justified in laying before a man, more than you are

justified in exposing him to. You are not justified in

*236 raising so fearful an issue. *Look for a moment at the case of the five years; Lord Alford might have died an infant, and the Earldom of Brownlow might have descended upon him with the other dignity not acquired during his lifetime. It is said that this honour is to be acquired by merit, and that this was what the testator looked at. But look at the probable case, that while Lord Alford was an infant, Lord Brownlow might have died, and the earldom have descended to Lord Alford. Lord Alford, being an infant, would have been incapable, of course, of doing any act; he could not have acquired that dignity of Duke or Marquis of Bridgewater by merit, it would have been impossible for him to do so. Then what would have been the position of the

Crown? Here is a young nobleman — an Earl — to whom this property has been left, as a child, wholly guiltless of any neglect whatever, belonging to an ancient stock and a noble family, and the Crown has the means, by giving him only one more step in the peerage, to secure to him an estate of 70,000*l.* a year. My Lords, it is a position in which no subject has a right to place the Crown, — no subject has a right to play, if I may so say, with the prerogative of the Crown, or to make the prerogative of the Crown the basis of an arrangement as to his own property. No subject has a right to do so. Dignities ought to come from merit, and from merit alone. Look at the case in another view: suppose Lord Brownlow to die, and Lord Alford to be of age, and that, just then, the earldom descends to Lord Alford. Lord Alford in that case — just come of age, for example, or he might be older — would have five years to acquire the title of Duke or Marquis. How is any man in this country, by fair means, to acquire the title of Marquis or Duke, or any particular title he chooses to chalk out for himself? If the Crown confers the title, — the very first act of the Crown is to select the title, — the Crown, out of deference and regard to the subject whom it means to enoble, may desire to be furnished * with certain titles, but the Crown selects * 237 the title, the subject is never allowed to select it. He may by grace and favour name a title, but the Crown selects the title, though it may select that which the man may wish to have conferred upon him. Now, my Lords, observe what Lord Alford would have to do in five years, let his age be what it would when the earldom came to him. He must procure a dukedom or marquise, and this particular dukedom or marquise, with particular limitations, or the estates are to go over. It is said that the testator did not mean that the title should be acquired by any thing but merit. What merit, in five years, could enable any man so to enoble himself? Is it to be in the senate, — is it to be in diplomacy, — is it to be in the army or the navy, or in the law? How is he to determine where his services are to be given, or his talents exercised, in order to entitle him in five years to the most distinguished mark of favour which the Crown has it in its power to bestow upon a subject? It appears clearly to me, therefore, that this is not a question turning upon the grace and favour of the Crown, but is a case of a vast estate given to a person in order to feed the posthumous vanity of the testator, that he might die in the belief

that his estates would once more be annexed to a dukedom or marquisate of Bridgewater, and he, for this purpose, furnished the means, and with them the temptation to exercise them, in order to obtain that dignity.

My Lords, there are just a few remarks that I wish to make upon public policy. I will not add a word to what has been already said by my noble and learned friends, but I will call your attention to what fell from one of the learned Judges (Mr. Justice Cresswell) as regards the restraint of trade. That learned Judge says that with regard to the restraint of trade, there is a maxim

in common law,— and he refers to a case in the Year

* 238 Books¹ * to prove it; but the learned Judge did not tell your Lordships upon what that maxim was founded. Nobody supposes that there was any statute upon the subject in those times. Upon what, then, was that maxim founded? Why, upon public policy for the good of the realm. It was not good for the realm that men should be prevented from exercising their trades.

Now let us see what this particular case is: it lies in a few words, and remarkable consequences have resulted from it. It was an obligation with a condition that if a man did not exercise his craft of a dyer, within a certain town, that is, where he carried on his business, for six months, then the obligation was to be void; and it was averred that he had used his art there within the time limited; upon which Mr. Justice Hull, being uncommonly angry at such a violation of all law, said, according to the book, "Per Dieu," if he were here, to prison he should go until he made fine to the king, because he had dared to restrain the liberty of the subject. I wish to draw your Lordships' attention to this case. Angry as the learned Judge was at that infraction of the law, what has been the result of that very rule without any statute intervening? That the common law, as it is called, has adapted itself, upon grounds of public policy, to a totally different and limited rule that would guide us at this day, and the condition which was then so strongly denounced is just as good a condition now as any that was ever inserted in a contract, because a partial restraint, created in that way with a particular object, is now perfectly legal. Without any exclamation of the Judge, and without any danger of prison, any subject of this realm may sue upon such a condition as Mr. Justice Hull was so very indignant

¹ 2 Hen. 5, pl. 26.

at in that particular case. That shows, therefore, that the rule which the learned Judge, whose opinion is now before the House, thought depended upon some rule of common law, regardless of * policy, was founded upon public policy, * 239 and has been restrained and limited, and qualified, up to this very hour, and beneficially so, by that very policy which it is supposed had no bearing at all upon the foundation of the rule.

My Lords, there has been great discussion about distinctions between wagers and conditions. Certain rules have been laid down by some of the learned Judges, and dissented from by other learned Judges, which I do not mean to follow ; I mean particularly in the advice I tender to your Lordships, to guard myself against this ; I am acting in that advice upon what I consider a great principle of law, and I am advising you to apply that principle to the particular case before you ; I strongly advise you to follow the example of my legal predecessor's, and not to lay down upon this occasion any abstract rules. Let each case be decided upon principle, let each case as it arises be subjected to the consideration of the Judges, and you will find in that way, taking the example of perpetuities, that a clear rule of law will be formed. If, in the case of perpetuities, this House had attempted, at starting, to fix a limit, and to lay down a certain rule which was not to be departed from, it would have done great mischief, and we should not have had the rule of property acted upon, which we now enjoy. My Lords, one of the learned Judges, Mr. Justice Talfourd, refers to, and Mr. Baron Alderson puts a case about the danger of wagers. He puts the case of a wager on the Queen's life, and, alluding to a wager upon the duration of that life being void, he asks whether a lease upon the Queen's life would not be good. Why, of course it would be good. It has no tendency to mischief. It is rather, generally speaking, meant in honour of the parties whose names are taken. The object is, that the persons who grant leases may, from the dignity of the nominee, know when that life drops ; but no * mischief has ever occurred from * 240 it ; if it had occurred, it would at once have been provided against. But suppose this case, — suppose a devise to one for life, with a proviso that if the Queen was not dead that day six months, the estate should cease. Would not that be an illegal proviso ? Of course it would be. And your Lordships have shown by your

decision in a case that was decided lately by this House,¹ that a Judge with the smallest interest was incapable of trying a cause, not because anybody supposed that he would be influenced (nobody supposed so), but because the principle is, that a man shall not have an interest in a matter which he is to decide. You must take the general principle. But it is said by the learned Judges, "Yes, that is a principle of law." No doubt it is, but upon what was that principle founded? Does any man doubt that it was founded upon public policy? That is an expression which is well understood. Does any man doubt it? One of the learned Judges who denied that there was public policy in the case of the restraint of trade is contradicted by another learned Judge, Mr. Baron Parke, who was of opinion that it was founded upon public policy. That learned Judge's opinion I considered as containing within itself the opinions of the great majority of the Judges. My Lords, a case was put by one of the learned Judges of this sort,—that a subject went to the Crown and said, "If the Crown will grant a dignity to such and such a member of my family, I will settle a great estate upon that person." The learned Judge said that was perfectly legal, and he could not see where the distinction was between such a case and the present. Now I see a very broad line to be drawn between that case and this. It may not be considered a wise thing to do; but clearly it is not illegal. Suppose a great

family desires, as often has happened, that the second

* 241 * son should be made a peer in order to found a separate family. Nothing could, I think, be more reasonable, when asking upon proper grounds for the favour of the Crown, than to tell the Crown that that dignity would be sustained by a sufficiently ample estate, nothing could be more proper; but there the Crown is not fettered at all; the Crown will accept or reject just as it thinks the party deserving of its favour or not. That is not the case of a man who has left his property in such a manner that he cannot afterwards remedy or alter it, death having intervened. There is no question of that sort in the case suggested,—the man is living, and the Crown does not care how that man may dispose of his property. The Crown would not grant a dignity merely because an estate was to be attached to it; if it did, every wealthy person in the kingdom would have a dignity conferred upon him. That is different from the case now before the House; here we are

¹ *Dimes v. The Grand Junction Canal*, 3 H. L. Cas. 759.

dealing with the dispositions of a dead man's property, and we are to consider whether we can or not leave it safely under the rule which he has laid down.

My Lords, one of the learned Judges (Mr. Justice Crompton), in giving his opinion to your Lordships, says, that there is no capricious disposition by which, according to the law of England, a man may not leave his property. I believe, my Lords, that is rather too broadly laid down. It has already been shown in the argument, that no man can attach any condition to his property which is against the public good. For instance, the case put in the old books of a man making a condition that his devisee shall not cultivate his arable land. That is void, because it is against the prosperity of the country,— and for no other reason. But there are many other dispositions that a man may not make of his property; and I will give your Lordships a few instances.

A man cannot alter the usual line of *descent by a creation of his own. A man cannot give an estate in fee simple to a person and his heirs on the part of his mother. Why? Because the law has already said how a fee simple estate shall descend. This is a case in which he cannot alter it; in which the law does not allow a capricious disposition of property. A man cannot by law give an estate to a private charity; the law would not execute,— it is so vague. In the case of *Townley v. Bedwell*¹ Lord Eldon decided against the validity of a gift for maintaining a botanic garden, upon the ground that it was stated to be intended for the public benefit. He thought that was too large, and not within the Statute of Charitable Uses. A man cannot give his property generally to objects of liberality or to objects of benevolence, and I might multiply instances. There are many instances in which the rule admits of exception, for a man cannot indulge in every fanciful disposition of his property. The law of England, however, does this which no other law in the world accomplishes, and I hope your Lordships will, in another capacity, take care not to break wantonly and without consideration into that law. The law of England enables you at once to put your estate in settlement for the purpose of providing for those who are to come after you, and, at the same time, it gives all the rational power of disposition which any man could wish to have vested in him, and which, I believe, no other law in the world accomplishes in so

¹ 6 Ves. 194.

perfect a manner or so well as the law of England. But, my Lords, the law of England knows where to step in and to stop any improper disposition, such as that before your Lordships ; and I think that this, therefore, is a case in which the exercise of that power, large as it is given by the law of England, ought to be properly restrained.

* 243 * My Lords, I wish before I sit down to draw your attention to an authority, and an ancient one, one that has had great influence on the law of England, to show that this doctrine of public policy is authorised by the greatest authority in the law to be applied to a subject like that before your Lordships ; that is, a testamentary disposition of property. Putting aside wagers, and putting aside contracts, and involving ourselves in nothing which is not germane to the matter, but taking the actual case of a disposition of property, let us see whether public policy is in this country not strictly within the rules of the Courts, and must not continue to be so according to the decided cases. My Lords, the case to which I invite your attention is the well-known *Duke of Norfolk's Case*; ¹ and your Lordships will recollect that that was the first time in which, by way of trust, there had been an attempt to carry over an estate upon a contingency to happen in a lifetime. We should be astonished now to hear it stated, but then the question was, whether you could limit your estate over upon a contingency to happen in the lifetime of a living person. The three Chief Justices delivered their opinions, and they were unanimously of opinion that it was against the law ; Lord Nottingham was of opinion that it was in accordance with law, and decreed accordingly. The three Chief Justices were Montagu, North, and Pemberton, the second of whom afterwards became Lord Keeper, and upon a rehearing, he reversed the decree of Lord Nottingham. The case was then brought to your Lordships' House, and this House reversed the Lord Keeper's decree and affirmed Lord Nottingham's decree,² and it wisely did so. But I would now call your attention to what the grounds were upon which Lord Nottingham was justified in disagreeing, and had the courage

* 244 to * disagree, with what was, at that time, such great authority, — the united opinions of the heads of every Court in Westminster Hall, — all of them men entitled to very great attention from their individual learning. In that case, Lord

¹ 3 Ch. Cas. 1.

² 3 Ch. Cas. 54.

Chief Justice North's opinion was against the validity of the devise, yet he said,¹ "I conceive the rules of law to prevent perpetuities are the polity of the kingdom, and ought to take place in this Court as well as any other Court." So that the Lord Chief Justice thought that the policy of the kingdom, which was observed in every other Court, ought to be observed in the Court of Chancery. Lord Nottingham, upon the first argument, made this observation :² "Pray, let us so resolve cases here that they may stand with the reason of mankind when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides ? I would fain know the difference why I may not raise a new springing trust upon the same term as well as a new springing term upon the same trust; that is such a chicanery of law as will be laughed at all over the Christian world." And upon a subsequent argument³ he said, "If there be a tendency to a perpetuity, or a visible inconvenience, that shall be void for that reason." He says again,⁴ "No man can say that it doth break any rule of law, unless there be a tendency to a perpetuity or a palpable inconvenience." He then says,⁵ "If, then, this be so, that here is a conveyance made which breaks no rules of law, introduceth no visible inconvenience, savours not of perpetuity, tends to no ill example, why this should be void, only because it is a lease for years; there is no sense in that." Then he was asked what bounds he would put. It was thought he was going to a vast extent in allowing a contingency upon a life in being, that must take place upon *the dropping of a life * 245 in being, and he was asked where he would stop, where were the bounds ? and he answered,⁶ "You may limit, it seems, upon a contingency to happen in a life. What if it be limited, if such a one die without issue within twenty-one years, or one hundred years, or while Westminster Hall stands ? Where will you stop, if you do not stop here ? I will tell you where I will stop,— I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee simple upon a fee simple are not yet determined ; but the first inconvenience that ariseth upon it will regulate it." So that your Lordships will see that that question was precisely germane to this. The question was by law,

¹ 3 Ch. Cas. 20.⁴ 3 Ch. Cas. 49.² 3 Ch. Cas. 33.⁵ 3 Ch. Cas. 51.³ 3 Ch. Cas. 48.⁶ 3 Ch. Cas. 49.

how far was the limit ? and Lord Nottingham, against the united opinions of the other three Judges, went further than ever had been gone before, and he did it upon grounds of public policy. He was asked, "Where will you stop ?" and he said, "I will stop wherever I find a visible inconvenience." Succeeding Judges have gone on, and now the rule is, that you may take a life in being, and twenty-one years after that life ; and that clearly shows how sound the principle of Lord Nottingham was, and how wisely it has been extended. The Judges have had no difficulty in stopping,— and why did they stop ? Because they found inconvenience. The principle of the law did not allow the tendency to perpetuity, and when a limitation had that tendency, they stopped at it. So here, these provisos are the subject of limitation, and you have to construe and mould them, if you can, so as to meet that principle in the law. If you find that they are not capable of being so dealt with, you must strike at the root of them, and upon what ground ? Upon the ground of public policy. Why should

not grounds of public policy be applied to limitations of this

* 246 * nature as well as to limitations of another, namely, in perpetuity ? it being important that you should not allow vague and vain limitations to be inserted in the will of a testator.

My Lords, I shall conclude with this one observation : I pray your Lordships to bear in mind, if you permit this mischief now to be introduced, what the bearing of it is, and where it will stop. You might not hereafter be able to stop it, because a visible inconvenience came, for if you permit this to pass where the inconvenience is so visible, you could not stop any other disposition. My Lords, men's minds are prone to embrace precedents, and to graft upon them new-fangled schemes. If your Lordships decide this case according to the opinion of the majority of the learned Judges, no man is wise enough to predict where the mischief will stop. I ask you to consider, if there should be, as there probably would be, a considerable number of landed proprietors, each attempting to raise a dignity attached to his own private estate, embarrassing and entangling the Crown, and embarrassing and perhaps leading into mischief the Crown's advisers, how the Crown would deal with the circumstances, and how the law would stand with respect to that which would become a public mischief. Your Lordships ought to strike at this disposition, upon the

ground, and upon the ground alone, that it is necessary to do so for the sake of public policy.

On these grounds I have to advise your Lordships that upon the first point there is no condition precedent, and that no such words can be imported by law as the learned Judges have advised your Lordships to import into the limitation. And upon the other point, that the condition subsequent, if it be a condition, is illegal, and therefore void, and consequently the decision of the Court below must necessarily be reversed.

*THE LORD CHANCELLOR.— My Lords, although I have * 247 the misfortune still to retain the opinion which I originally entertained, differing from that which has been expressed by the four noble and learned Lords who have addressed you, yet I do not feel it inconsistent with my duty, or with my respect to your Lordships, to state that it is not my intention to give in any detail the reasons for that difference; and I abstain from doing so on this ground. Four of your Lordships have stated, at great length, your reasons for thinking that the judgment ought to be reversed. My Lords, without making any distinction, such as is made in practice, though not in the theory of the constitution, between those noble Lords who are called Law Lords, and other noble Lords, and assuming that all noble Lords might equally give their opinions and votes upon this question, as upon every other, yet I may, I think, assume that no Peer would think fit, upon a question of this sort, to give his vote, who has not heard the whole of the arguments. There being only the four noble Lords to whom I have already alluded, besides myself, who have heard the whole argument, I may assume that your Lordships will only have to decide between the views of those four noble Lords and my own; and that, in fact, the four noble and learned Lords who have addressed the House have decided, or will decide, the question. If, however, I had been in the position of any one of those noble Lords,— that is, if the question had come before me now for the first time,— I should, although differing from them, and though my difference would be unimportant, have felt myself called upon to state in detail the ground of that difference of opinion. But inasmuch as this is an appeal from a decree made by myself, and inasmuch as the grounds upon which I pronounced that decree * are before your Lordships, fully * 248

stated, in print, being printed from my own manuscript, I do not think it is necessary that I should repeat what is already there stated. Whatever may be the demerits or the errors of that judgment, I am perfectly satisfied that I have not to accuse myself of having come to the conclusion at which I arrived, hastily, and without the fullest deliberation. I did give to the case my fullest attention; and the result of it is before your Lordships. My Lords, I think I know myself well enough to be able to say that, if my opinion had been shaken by the arguments which I have heard, I should have had no hesitation in stating at once that I had changed my opinion; and I should have made that admission the more readily because the circumstance of the great, I might almost say overwhelming, majority of the learned Judges who heard the case having concurred in the view which I take, would have relieved me from any thing like a sense of false shame if I had been convinced of any error. My Lords, it may be that it is difficult to change one's opinions, or it may be from other causes; what the causes are, I do not stop to inquire; but, in fact, I do retain the opinion which I formed at the original hearing of this case, and which is expressed in print as shortly and clearly as I was able to express it. Therefore it is that I do not think it will be necessary — I might almost say, respectful to your Lordships — to read over to you again that which you have already read, or to put in different language that which I have already stated in the best language I could command to convey my meaning; and consequently I simply say that I adhere to my original opinion. But there are one or two points which have occurred, partly in the course of the arguments, partly in the opinions of the learned Judges, and partly in some expressions which have fallen from

your Lordships in the course of what you have stated to
* 249 day, that do * induce me to make one or two observations,
and they shall be of a very limited character.

In the first place, I certainly felt in the course of the argument that perhaps I had been wrong in the use of the word "condition." I did not mean to use it in the technical sense of a legal condition, as connected with the creation of an estate in lands, but in the sense in which we use it when, speaking of common law pleadings, we say all conditions precedent must be averred. I thought the word "condition" expressed my meaning with sufficient accuracy, and I shall, for convenience' sake, continue the use of it at present,

assuming the justice of what has been said, that it is not, strictly speaking, a legal condition. But call it a contingent limitation, or a contingency, or give it what name you please, I think it is to be governed by the same considerations. Now certainly nothing that I have heard, either in the arguments at the bar, or from the four noble Lords who have addressed your Lordships, has at all (I speak with submission and diffidence, differing from such high authorities) shaken me in the opinion that this is in that sense a condition precedent. It is said that that could not have been the intention of the testator. My Lords, in my opinion, it is not a question of intention at all; whether a certain contingency operates as a condition precedent or as a condition subsequent is something collateral to the intention, and not dependent upon it at all. My opinion would not have been shaken if the will had said, "I mean all this to operate as a condition subsequent." Why? I take it, in deciding whether a condition is subsequent or precedent, what we are to look at is, to see the way in which the contingency is to operate, and if it is something which is to happen one way or the other, before that which is contingent upon it can be decided, that is in the nature of things precedent.

Now can there be the least doubt that the testator meant

*(I collect his meaning only from the words of his will) *250
that if Lord Alford, dying in the lifetime of his father, had not, at his death, obtained the required dukedom or marquisate, Lord Alford's son at his death should not have, and Lord Brownlow's next son should have, the estate? This seems to me, after all that has been said, to be a proposition utterly incontrovertible. And to say that such a proviso shall operate as a condition subsequent, if it is in the nature of things a condition precedent, seems to me confounding that which is the subject matter of intention with that which is not, and cannot be, the subject matter of intention at all.

My Lords, let me put this case: Suppose Lord Alford had survived his father and had become Lord Brownlow, and had then lived for five years, and the question of the operation of the proviso had afterwards come into discussion, and suppose that in this will the testator had said, after the proviso, in that case defeating the estate, "I intend that proviso to operate as a condition precedent," I should wholly have disregarded that statement. I should have said, What can be meant by its operating as a condition prece-

dent? It is in its nature a condition subsequent, and therefore all the rules that attach upon conditions subsequent will be applicable to it, although the testator has chosen to call it a condition precedent. I think that exactly the same principle applies in the opposite direction. No doubt very ingenious arguments have been adduced to show from the terms of the will that the testator meant this to operate as a condition subsequent. I cannot believe that any such thought ever crossed the mind of any testator. The testator does consider how his property is to go, but whether it is to go by one rule of law, or by a condition of one character or another, never crosses the mind of any testator. It is something altogether beside intention.

My Lords, my noble and learned friend who last ad-
* 251 dressed * your Lordships adverted to the case of *Phipps v.*

Ackers,¹ and many cases of that sort. The Courts have in those cases got over contingencies, and have made violent struggles to get rid of them, and have treated the will as if it had been worded differently from its actual wording. The Courts in those cases have seen, or have thought they saw, an intention in the testator which would be defeated by the use of the words in the way he has used them, — they have got over the use of words, in order to carry into effect the supposed intention. But in this case nobody surely can doubt what the intention of the testator was; and if it was a lawful intention, it will be defeated by the course which your Lordships are about to take.

Let me ask your Lordships to try the question, whether this is a condition precedent or subsequent by this test. One of the learned Judges (Mr. Baron Parke) in his opinion says that you cannot, in trying this condition by any suggestion, bring it to the test of special pleading, because in actions of ejectment there is no special pleading; but it occurred to me to suggest this case to your Lordships, — I will suppose an action of covenant. I do not profess to be a very expert special pleader, but I think this is a matter so much in the substance of the case that I cannot be wrong in what I am about to suggest. It is a well-known rule that all conditions precedent, using the word "condition" in rather a loose sense, must be averred by the plaintiff upon his declaration; whereas a condition subsequent, which defeats a previously acquired right, need not be alluded to by the plaintiff, — it must be set out by the

¹ 3 Clark & F. 665, 702, 9 Clark & F. 583.

defendant. Let me suppose an action of covenant, and the declaration of the plaintiff to state that the defendant, by his deed under his hand and seal, covenanted with the plaintiff that he would pay to J. S. during the life * of J. S. an annuity * 252 of 100*l.*, and would, after decease of J. S., pay to such person as should then be heir male of the body of J. S. a like annuity of 100*l.*, by half-yearly payments, the first payment to be made at the end of six calendar months next after the decease of J. S. Provided always, that if J. S. should not in his lifetime acquire the title of Duke of Bridgewater, then the said annuity so payable to the heir male of his body should cease and be void. And that in such case it should be payable to X. Y. for his life, and after his death to such person as should be heir male of his body, with a like proviso in case X. Y. should not acquire the title of Duke of Bridgewater. The declaration I then assume shall go on to state that the defendant, during the life of J. S., paid him the said amount as it from time to time became due; that J. S. died on the blank day of blank, leaving J. N. his eldest son and heir male of his body; and though more than three years have elapsed since the death of J. S., and though J. N. is still alive, yet defendant has not paid to J. N. the same amount, or any part thereof, to the damage, &c. Demurrer by defendant for want of averment that J. S. had in his lifetime acquired the title of Duke of Bridgewater. Are your Lordships prepared to say that that would have been a bad demurrer? In a matter of this sort it may be a little dangerous to speak off-hand with very great confidence, but I am strongly of opinion that that would have been a good demurrer. And I am not at all inclined to think that it would have been rendered a less good demurrer if the deed had expressly stated that the condition should operate as a condition subsequent. The question would have been no more affected by the declaration of the intention of the parties than if they had said, "It shall operate as a fine or a recovery," or any thing else. The question would have been, was it intended that J. N., and the heirs male of his body at the death of J. S., should * take any * 253 part of that annuity unless J. S. had obtained the dukedom in the lifetime? In my opinion, it would be necessary that the obtaining the dukedom should have been averred. Perhaps it may be said that this form of putting the question is only *idem per idem*. It is exactly this case, and if it does not illustrate my meaning, I

must then only fall back upon the reasons I have given in the judgment which is now in print, and must leave your Lordships to consider my attempted illustration as not adding to the weight of the reasons I there gave.

My Lords, if I was right in thinking that the condition in this case was a condition precedent, the other question substantially does not arise. It might arise in certain contingencies, but I do not think it necessary for me to go into that question. I have stated my grounds for thinking that there was nothing in the nature of the proviso which this House or any Court of Law could deal with as being void upon grounds of public policy. I shall not repeat the reasons which I have stated : this subject of public policy is always exceedingly difficult to deal with. Lord Nottingham, in dealing with the doctrine of perpetuity, thought that a limitation tying up an estate for a period not exceeding a life in being and twenty-one years afterwards, was good ; that limitation has been adopted and acted on ; but it would be a very dangerous thing now to say that, in deciding a question of perpetuity, we should be governed, not by any fixed rule, but by what we might consider to be public policy, that we should extend or narrow the period until practical inconvenience was felt. I only wish your Lordships had been called on to decide the Thelluson will, for I protest that, to my mind, whatever inconvenience arises on grounds of public policy as applicable to the proviso here, I think that public policy was thwarted in a tenfold degree by Thelluson's will.

* 254 * The object of that will was to keep mankind out of the enjoyment of an enormous sum of money, which, according to the calculation of actuaries, might have amounted to many millions before anybody should enjoy any part of it or more than a small portion of it, to keep everybody out of the enjoyment of it for a period of some sixty or seventy years. The Court said there was nothing in the law to prevent it ; but that it was contrary to public policy is proved by the fact that in the very next year the Legislature interfered to prevent anything of the sort happening for the future.

My argument, my Lords, is but an additional argument to those I have already stated, which are in print, and which I shall not trouble your Lordships by referring to again. I must make one observation, that if I have come to an erroneous conclusion, it is an error which I think I have less reason to regret than perhaps

could ever have fallen to the lot of any Judge who has committed an error ; because it was stated to me as Vice-Chancellor, when the case was under argument by the learned counsel, that they argued the matter in order to get a decision, but I believe neither party cared which way the decision went. If I had wished for an excuse for indolence, it was tendered to me by the counsel on both sides, who in substance said, If your Lordship will only state your impression upon the subject, and make a decree, that will satisfy us, for all we want is a *locum standi* in the House of Lords. I mention this for the purpose of saying that I did not think it consistent with my duty to take that course ; I did come, as it turns out from the opinion of the noble and learned Lords, to which I most readily bow, to a wrong conclusion, though I am supported in that conclusion by the great majority of the Judges, who also differ from their Lordships' opinion. I can only say that I am glad that the real rights of the parties have now been correctly ascertained, and I shall rejoice, in one sense, * as * 255 much as any of your Lordships can do, that the attempts to make these extraordinary wills will be found not very easy to carry into effect. I feel as much as any of your Lordships that it is exceedingly to be deprecated that parties should be allowed to puzzle mankind and interfere with the ordinary enjoyment of property by any contrivances or provisions out of the ordinary course of limitations.

LORD BROUGHAM. — My Lords, I believe we are all of opinion that the attention my noble and learned friend gave to this case was most diligent and entire, and that he might very easily have spared himself the trouble of giving any judgment in the Court below. It was undeniable, upon all hands, that the case was brought into that Court with the view of its being ultimately brought to your Lordships' House, whichever way my noble and learned friend decided it.

Decree reversed with directions. Costs of all parties to be paid out of the estate.

August 20.

Counsel appeared at the bar.

Mr. Rolt, on behalf of the Egertons of Tatton, submitted that,

as his clients had now no further interest in the cause, the order of the House might be drawn up, dismissing them from the suit.

The Solicitor-General thought that that could not be conveniently done. He then suggested certain words to be introduced into the order, and said that it ought to be left to the Court below to deal with the matter of dismissing these respondents from the suit.

THE LORD CHANCELLOR agreed that that would be the proper course.

* 256 * The following Order was made: After reciting the petition of appeal and the hearing, it was "Ordered and adjudged, that the said decree of the 26th of February, 1852, so far as complained of in the said appeal, be, and the same is hereby, reversed; and it is declared that the several provisos contained in the will of John William Earl of Bridgewater" [all of which relating to the acquisition of the title were then set forth] "are in the nature of conditions subsequent, and not precedent, and are invalid and void in law: And it is further declared, that the said appellant is, under and by virtue of the said will and codicils of the said John William Earl of Bridgewater in the pleadings mentioned, equitable tenant in tail male in possession (subject to the jointure of his mother, Lady Marianne Margaret Egerton in the pleadings mentioned, and to the term for securing the same) of the estates (other than leasehold estates for years), subject to the trusts of the said will, and is absolutely entitled to the leasehold estates for years and personal chattels thereby bequeathed to go as heirlooms; but as to such leasehold estates and personal chattels, subject to the gift over in such will in the event of his dying under the age of twenty-one years, without leaving issue male of his body. And it is further ordered, that the cost of all parties in respect of the said appeal (the amounts of such costs to be certified by the Clerk Assistant) be paid by the trustees of the said will out of the personal estate of the said testator, John William Earl of Bridgewater: And with these declarations it is also further ordered, that the cause be remitted back to the said Court of Chancery, to proceed further in the said cause, as shall be just and consistent with these declarations and this judgment."

* EDEN v. WILSON.

* 257

1852. December 13, 14.

SIR W. EDEN, Bart., Appellant.
ELEANOR WILSON and others, Respondents.

Will. Construction. Proviso. "Living at her Death."

M. D. devised certain estates to his nephew, Sir J. E., Bart., for life, and after Sir J. E.'s decease to his second son and his heirs male; and in default to the third son and his heirs male, and so on, with a proviso, that if the baronetcy should come to or descend to the second son of Sir J. E., the estates should go over to the next in succession. P. J., the father of Lady E., by a will made subsequently to that of M. D., devised his estates to his daughter, Lady E., for life, then to her eldest son for life, and his heirs, and for default, &c., to the second son of Lady E. for life, and to his heirs ("in case he shall not become, or shall not continue, seized of the real estates of M. D. by virtue of his will"), and to the third and every other son of Lady E., subject to the like condition, "Provided always, that if it shall happen that my said daughter shall have no issue male of her body *living at her death*, or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates, hereby limited and settled as aforesaid, then, and in either of those cases, I devise all my said real estates, subject respectively as aforesaid, to all the daughters (if more than one) of the body of my said daughter, who shall be living at her death, as tenants in common, and their heirs, &c.," with cross remainders amongst them; "and if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs." At the time of the death of Lady E. there were two sons and several daughters living; both sons afterwards died without issue:—

Held, that the daughters of Lady E. did not take any estate under the limitations of the will of P. J., for that the words "living at her death" applied to both branches of the proviso, and that the contingency on which the daughters were to become entitled determined at the death of their mother.¹

THIS was an appeal against a decree of the Master of the Rolls (Lord Langdale), founded on a judgment of the * Court of Queen's Bench. The respondents, three of the * 258 daughters of Sir John and Lady Eden, deceased, and the granddaughters (maternally) of Peter Johnson, of York, Esq., claimed to be entitled as tenants in common, in fee, to

¹ Abbott v. Middleton, 7 H. L. Cas. 68, 88, 94; Coltsmann v. Coltsmann, Law Rep. 3 H. L. 121.

certain real estates devised by their grandfather. His will expressly referred to that of Morton Davison, of Beamish, in the county of Durham, Esq., who was a relative, and it was construed with relation thereto.

Morton Davison, by a will dated 9th November, 1769, and executed so as to pass real estates, devised all his freehold and other estates, tithes, and hereditaments, in case he should leave no issue, unto the use of his nephew, Sir John Eden (the husband of Lady Eden), and his assigns, for life, with remainder to trustees, to preserve contingent remainders; and from and after his decease, in case Sir John Eden should have more sons than one of his body lawfully begotten, unto and to the use of the second son of his said nephew, Sir John Eden, and of the heirs male of the body of such second son, and for default of such issue, to the use of the third, fourth, and of all and every other son and sons of the body of his said nephew, Sir John Eden, lawfully, &c., except his eldest son, severally, successively, and in remainder, one after another, as they and every of them should be in priority of birth, and of the several and respective heirs male of the body and bodies of all and every such third, fourth, and other son and sons, except his eldest son, lawfully issuing; the elder of such sons, and the heirs male of his body, being always preferred, and to take before the younger of the same sons, and the heirs male of his and their body and bodies issuing; and with divers remainders over. Then followed this proviso: —

“ Provided nevertheless, that notwithstanding any thing hereinbefore contained to the contrary thereof, in case the title of

* 259 baronet now vested in my said nephew, the said Sir * John

Eden, shall descend and come to the second, third, or any other the younger son of the said Sir John Eden, or to any other person or persons to whom my said manors, &c. are by this my will devised and limited, before or at the time when he or they or any of them shall be in the actual possession of my said manors, &c., by virtue of the limitations in this my will contained, then and in such case, and from time to time, and when and so often as

ame shall so happen or be, the use, estate, or interest herein and limited to such son or sons of the said Sir John Eden, such other person or persons as aforesaid, on whom the said shall descend and come, of and in my said manors, &c., d from thenceforth cease and be utterly void, as if such

person was naturally dead ; and that then and in every such case it shall and may be lawful to and for the person who by virtue of the limitations aforesaid shall be then next entitled in remainder to the said manors, &c., to enter into and to hold and enjoy the same for and during the estate and interest hereby devised and limited to him therein as aforesaid."

Morton Davison died in 1774.

Peter Johnson, by his will, dated 1st February, 1779, executed and attested so as to pass real estates, gave his estates to his wife for life ; and after making other provisions, the will proceeded thus : " And as to all my other real estates whatsoever and where-soever, which I have power to dispose of (and not hereby directed to be sold), whether freehold or copyhold, subject to such trusts and charges as aforesaid, from and immediately after the decease of my wife, I devise the same respectively to my dear daughter and only surviving child, Dorothea, the wife of Sir John Eden, baronet, for her life, without impeachment of waste " ; then to trustees to preserve contingent remainders ; " but nevertheless to permit and suffer my said *daughter to receive the * 260 rents and profits of the same estates, subject respectively as aforesaid, to her own use during her life ; and from and after the decease of my said daughter, I devise all the same estates, subject respectively as aforesaid, to my grandson Robert Eden, eldest son of my said daughter, for his life, without impeachment of waste " ; then to trustees to preserve contingent uses ; " and from and after the decease of the said Robert Eden, I devise the same to the first son of the body of the said Robert, and the heirs of the body of such first son lawfully issuing, and for default of such issue, to the second, third, and every other son of the body of the said Robert, severally and successively, and the heirs of the respective bodies of such second, third, and every other son, the elder of such sons, and the heirs of his body, always to be preferred and to take before the younger of them and the heirs of their bodies respectively ; and for default of such issue, I devise all the same real estates and premises, subject respectively as aforesaid, to my grandson Morton John Eden, second son of my said daughter, for his life, without impeachment of waste (in case he shall not become or shall not continue seised of the real estates of Morton Davison, late of Beamish, in the county of Durham, Esq., deceased, by virtue or in consequence of his will) " ; then upon trust to pre-

serve contingent uses; "and from and after the decease of the said Morton John Eden, I devise the same (upon the conditions aforesaid) to the first and every other son of the body of the said Morton John Eden, severally and successively, and to the respective heirs of the bodies of such first and every other son lawfully issuing, the elder of such sons and the heirs of his body always to be preferred and take before the younger of them, and the heirs of their bodies respectively; and for default of such issue, I devise

the same real estates and premises, so subject and upon the

* 261 * like condition as aforesaid, to the third and every other younger son of my said daughter, &c. ; the elder of such un-

born sons and the heirs of his body always to be preferred and take before the younger of them, and the heirs of their bodies respectively : Provided always, that if the said Morton John Eden, or any son of my said daughter, shall at any time during his life become seised of the real estates of the said Morton Davison, by virtue or in consequence of his will, then the said Morton John Eden, or such son of my said daughter so becoming seised thereof, or any heir of his body respectively, shall not take, have, or enjoy any estate or interest whatsoever in any of my real estates by virtue of this my will, so long as he or they shall be so seised of the real estates of the said Morton Davison ; but the same shall remain and go over (subject as aforesaid, and after the determination of the particular estates thereof hereby limited) to, and shall be taken, held, and enjoyed by the next son in succession of my said daughter, and the heirs of his body, in the same manner as if such son so seised of the real estates of the said Morton Davison was dead without issue ; but if it shall happen that the said Morton John Eden, or any other son who shall or may become seised of the said real estates of the said Morton Davison, shall afterwards become disabled, by any condition or proviso in his will, from continuing to enjoy the same, then and as soon as the said Morton John Eden, or any such son of my said daughter, shall have quitted the possession, and shall be no longer in the receipt of the rents and prof-

the real estates of the said Morton Davison, in conformity such condition or proviso in his will, the said Morton John and the heirs of his body, shall and may have, hold, and enjoy my said real estates hereby intended to be limited and settled as aforesaid, and according to the limitations thereof hereinbefore * contained : Provided always, that if it shall

happen that my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates hereby limited and settled as aforesaid, then and in either of those cases, I devise all my said real estates, subject respectively as aforesaid, to all the daughters (if more than one) of the body of my said daughter who shall be living at her death as tenants in common, and their heirs respectively, with cross remainders amongst them, in case of any one or more of them happening to die under the age of one-and-twenty years, and without issue; and if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs: Provided always, that if any such daughter or daughters of my said daughter shall happen to die in her or their said mother's lifetime, leaving issue, then my will is, that such issue of each such daughter so dying, and the heirs of such issue respectively, shall have and take the same estates, or share or shares of estates, as the parent or parents of such issue respectively would have been entitled to if she or they had been living at the decease of my said daughter; and in case my said daughter should have no issue of her body living at her death, then I devise all such my real estates, from and after the determination of the particular estates hereinbefore thereof limited as aforesaid, to such person or persons, and for such estate and estates, either in fee simple or otherwise, and in such manner as my said daughter, whether married or sole, shall, by any deed or deeds, executed in the presence of two credible witnesses, or by her last will and testament, or any writing in the nature of a will, signed in the presence of three such witnesses, direct or appoint; and for want of any such appointment, and * sub- * 263 ject thereto, and to the several limitations and charges in this my will, I leave all such real estates to descend to my own right heirs."

Lady Eden, the only child of the testator, died (in 1792) in his lifetime, intestate; she had two sons, namely, Robert, afterwards Sir Robert Eden, baronet, her eldest son and heir at law and customary heir, and who was also the heir at law and customary heir of Peter Johnson at the time of his decease, and Morton John Eden; and eleven daughters, namely, Dorothea Eden, Maria Eden, Catherine Eden, Elizabeth Eden, Caroline Eden, Dulcibella Eden,

Anne Eden, Emmeline Eden, Eleanor Eden, Harriet Eden, and Charlotte Eden, and no other children.

Elizabeth, Caroline, and Harriet, died in the lifetime of their mother, under the age of twenty-one years, and without having been married, but Lady Eden's other daughters and her two sons survived her; and Dulcibella and Anne, having respectively attained the age of twenty-one years, died respectively in the year 1805, intestate as to real estate, and without having been married, leaving Robert Eden, their eldest brother, their heir at law and customary heir.

Peter Johnson, the testator, died in 1796, and Dorothea Johnson, his wife, entered into the possession of the estates devised to her, and so continued until her death in 1810.

Sir John Eden died in 1812, and was succeeded by his son Robert, who, shortly after the death of Mrs. Johnson, had entered into the possession of the freehold and copyhold estates devised to him for life, and so continued until his death.

Morton John Eden, on the death of his father Sir John Eden, became seised of the estates of Morton Davison, referred to in the will of Peter Johnson, and died on the 28th of June, 1841, in the lifetime of his brother Sir Robert Eden, and without ever having had issue.

* 264 The respondent Eleanor Wilson was the widow of the Rev. Thomas Fourness Wilson, who died some years since. The other respondents are her sisters or their children.

Sir Robert Eden, by his will, dated in 1815, and which was afterwards republished by a codicil thereto in 1841, gave and l his estates, lands and hereditaments, whatsoever and er, in Durham and York, and elsewhere in Great Britain ; the Johnson estates), to certain uses in his said will , which failed to take effect, with an ultimate limitation of the appellant, Sir William Eden (the next heir to the heirs, and assigns for ever ; and on the death of Sir en, in 1844, Sir William Eden, as such devisee entered ision of the estates so devised.

20th of February, 1845, Eleanor Wilson filed her bill in Court of Chancery against Sir William Eden, the present and other necessary parties, and therein stated, amongst gs, the will of Peter Johnson, and prayed that the will established, and the trusts carried into execution, and

that an account might be taken; and that Sir William Eden might be ordered to deliver up possession of the share of the respondent Eleanor Wilson, therein to her, or as she should appoint, and for further relief.

All the defendants appeared and put in their answers, and the cause came on to be heard before the Master of the Rolls on the 8th July, 1846, when his Lordship was pleased to order that a case should be prepared for the opinion of the Barons of the Court of Exchequer; and that the question submitted for their consideration should be, whether the daughters of Dorothea, the wife of Sir John Eden, baronet, or any and which of them, took any and what estate or interest in the estates devised by the will of * Peter Johnson, or any and which of them; and his Lord- * 265 ship reserved further directions and costs.

The case was argued before the Court of Exchequer, and judgment thereon was pronounced by the Lord Chief Baron on the 18th of January, 1848, and the following certificate was signed by the Lord Chief Baron, and Barons Alderson, Rolfe, and Platt: "We have heard this case argued by counsel, and we are of opinion that the daughters of Dorothea, the wife of Sir John Eden, did not, nor did any of them, take any estate or interest in the estates devised by the will of Peter Johnson, the testator."¹

In November, 1848, the cause came on to be heard before the Master of the Rolls, for further directions, and as to costs, when, after argument, his Lordship ordered that the case for the opinion of the Barons of the said Court of Exchequer should be laid before the Judges of the Court of Queen's Bench for their opinion, and further directions and costs were reserved.²

The case was accordingly argued before the Judges of the Court of Queen's Bench, who pronounced their judgment on the 18th December, 1849, and returned a certificate, signed by Justices Coleridge, Wightman, and Erle, and which certificate was in the words following (that is to say): "We are of opinion that all the daughters of Dorothea, wife of Sir John Eden, baronet, in the pleadings of this cause mentioned, who were living at her death, took an estate in fee as tenants in common in the estates devised by the will of Peter Johnson to Lady Eden for life."³

The cause again came on to be heard on the 5th and 6th of March, 1850, before the Master of the Rolls, for further direc-

¹ 1 Exch. 772.

² 11 Beav. 289.

³ 14 Q. B. 256.

tions, and as to the costs reserved, when his Lordship
 * 266 * ordered that the certificate of the Judges of the Court of Queen's Bench should be confirmed ; and it was declared that, according to the true construction of the will, the respondent Eleanor Wilson, widow, and such other daughters of Dorothea, the wife of Sir John Eden, who were living at her death and survived the said testator, and attained the age of twenty-one years, and the issue (if any) who survived the said testator, of any of her daughters who died in her lifetime, took an estate in fee as tenants in common of the freehold and copyhold estates and hereditaments devised, and directions were given to carry the trusts of the will into effect, in conformity with this declaration.¹

This was the decree appealed against.

Mr. Bethell and Mr. Malins (Mr. Dumergue was with them) for the appellant. — The will of Peter Johnson must be construed with reference to the state of events at the time of the death of Lady Eden, and at that time alone. Such is its plain intention, and such its grammatical meaning. In substance the will is this : My daughter may, at the time of her death, have no male issue at all, or none at that time entitled to my real estate, by reason of holding the estates under the will of Morton Davison ; then the daughters of my daughter, living at the time of her death, are to take ; but she may then have no daughters, and if so, and if there is thus a failure of her issue, she is to have a power of disposition ; and in default of that, the estates are to go to my right heirs. The question is whether, in the events that have happened, the limitation in favour of the daughters is to take effect.

* 267 Court of Queen's Bench divided the * words, and held that the proviso did no more than continue the series of antecedent limitations by way of remainder, and not by way of executory devise ; and further, that the contingency would take effect, first, if the daughter had no male issue living at her death, and secondly, that it would take effect on the determination of the particular estates limited to the first and other sons of the daughter ; so that, if there was a failure of issue male of the sons while any daughters of Lady Eden were alive, the estates would go over to them.

This opinion is not warranted by the intention of the testator,

¹ 12 Beav. 454.

as deducible from the words of the will. Lady Eden might have died without male issue then living, and yet the antecedent limitations might be in full force and effect. For the limitation to the sons was in tail general ; and suppose the eldest son to have died, and left daughters then alive, there would be a failure of issue male of Lady Eden, and yet the limitation in favour of her eldest son would continue in force. The clause of the proviso on which the respondents rely, is that which refers to nothing else but the failure of male issue. But that cannot be made to answer the purpose of words introducing a remainder to the daughters on failure of the preceding limitations, for this reason, that the antecedent limitation is in tail general. So to introduce a remainder is an error. This important error affects all the other parts of the judgment. Then if the clause does not operate by way of remainder, it must operate by way of executory devise, the contingency being determined at the death of Lady Eden.

The Court of Queen's Bench discussed at large the grammatical meaning of the words employed, and treated the phrase "at the time of her death" as if it was applied only to qualify "issue male"; whereas the words "time of her death" must be read in connection with the words "if * it shall so happen": they * 268 overrule the whole sentence, and fix the period at which the proviso is to be applied. The words expressive of time must be connected with the words expressive of contingency. As the Court of Queen's Bench has construed this will, the words "during the life of any daughter of my daughter Lady Eden," must be introduced into the proviso. But there is no authority for their introduction. On the other hand, it is not necessary, for the purpose of the appellant's construction, to import any words whatever into the sentence, for the whole sentence as it now stands is intended to refer to one event, and to express two affirmative things with reference to the same period of time. The testator only regarded the circumstances which might happen to exist at the death of Lady Eden.

There is not in the will of Peter Johnson any direct and unconditional devise to the respondents. There is no regular vested remainder created in favour of the daughters. They can only take under certain contingencies which may happen, but which, to enable them to take, must happen at a particular time. The will does not give them an estate whenever it may happen that the

issue male of Lady Eden shall fail, but only if it should have failed at the time of her death. The intention was, that the son who, at the death of the testator's daughter, was possessed of the Davison estates, should not take the testator's estates ; and this limitation of time affects the whole sentence, and is not confined to any particular portion of it.

The principle of construction now contended for, is to be found in the case of *Shuldham v. Smith*,¹ which is a very high authority,

and has never been in any way questioned. There the gift

*269 was to trustees, to pay certain annuities to * persons specifically named in the will ; and the devise proceeded thus :

" And from and after the death of the survivor of them " (naming all the annuitants), " then I give and devise all and singular the said manors, &c. unto all and every the children of my said late sister Elizabeth that shall then be living, and their heirs," &c. In that case, although these words, " that shall then be living," were so much separated from the rest of the gift, they were held to apply to the whole of it, so as to confine the vesting of the interest to the period of the death of the last annuitant. The effect of that decision was to create an intestacy, and to defeat what was supposed to be the intention of the testator ; but the words of the will being clear, the Courts had nothing to do but to take the intention from the words and to act upon them. That case seems decisive of the present. The same principle has been acted on before and since. In *Denn d. Radclyffe v. Bagshaw*,² there was a devise to a daughter, with remainder to her first son, " if living at the time of her death, and the heirs male of such first son ; and for default of such issue, to the second son of her body, if living at the time of her decease, and the heirs male of such second son " ; and so on to the third and fourth ; and for default of such issue, to testator's nephew. The daughter entered under the will, and married, and had a son, who likewise married, and had a son, but died in his mother's lifetime ; and it was held that the words " if living at the time of her death " prevented either the son or grandson from taking any estate, but the remainder vested in the testator's nephew. *Doe d. Vessey v. Wilkinson*³ is to the same effect, and so are *Doo v. Brabant*⁴ and *Calthorpe v. Gough*.⁵

¹ 6 Dow, 22.

² 2 T. R. 209.

³ 6 T. R. 512.

⁴ 3 Brown, C. C. 393, 4 T. R. 706.

⁵ 3 Brown, C. C. 395, n., 4 T. R. 707, note.

* The first of the two events here stated, having happened, namely, that Lady Eden had issue male at the time of her death, the daughters cannot take. Then came another state of things. The gift was not only on a contingent state of circumstances, but to a contingent class of persons. It was not necessary that the male issue should survive the mother in order to be entitled, but the daughters must survive the mother in order to be entitled. The word "such," in the second branch of the sentence, has no meaning, and the sentence must be read as if it stood "no issue male entitled." Now here there existed, at Lady Eden's death, issue male, and issue male who were entitled.

The power of appointment given to Lady Eden furnishes an argument to show that the contingencies mentioned in the will were to be determined at the moment of her death, and could not afterwards take effect.

In this case, Mrs. Wilson filed a bill as devisee, and coming into Court in that character, she was bound to point out in what way she was entitled to it under the will. This she has not done, for there is no specific devise in her favour. And even as to the residue itself, that was given by the testator to his wife, and the respondents are excluded from the benefit of the residuary devise; for whenever there is a series of settled limitations which do not exhaust the whole fee simple, and the limitations conclude to the "own right heir" of the testator,—though that does not effect for the heir more than the law would have effected without such an expression,—yet, the expression being used, such property is excluded from the operation of a residuary clause, which only takes up what has not been disposed of. Though the testator cannot make his right heirs take as purchasers of the estate which is in him, still the expression of his intention will exclude the residuary devisee. * *Amesbury v. Brown*,¹ *Smith v. Saunders*,² *Robinson v. Knight*.³ *271

If the construction now contended for by the appellant is correct, the respondents have no title under the contingent clause nor under the residuary clause, and the bill ought in the Court below to have been dismissed.

Sir W. P. Wood and *Mr. Elmsley* for the respondents.—There

¹ 1 Vez. Sen. 477.

² 2 Eden, 155, 159.

³ 2 W. Bl. 736.

are two rules of law by which a will must be construed : first, that it is not to be so construed as to create an executory devise, if effect can be given to it as creating a remainder, and such remainder must be made to vest as speedily as possible ; and next, that words having a legal import may be controlled in their operation by general words which plainly express the testator's intention.

The intention of the testator here was to provide for the daughters, if, and whenever, the sons should be unable to hold the estates. The proviso must either be taken as one of a series of limitations following out previous limitations, and subsequently followed by a disposition of the fee, in which case it would be necessary to consider the previous limitations as creating an estate in tail male in the sons.

[THE LORD CHANCELLOR.—Are you going to contend that estates in tail male were created by the limitations to the daughters in the proviso ?]

No. But the estates in tail general were cut down by them. Or this proviso may be considered as a conditional limitation over on

the two alternatives which presented themselves to the mind

* 272 of the testator, and which the *respondents say were not only a failure of issue male, taking an interest under the will at the death of his daughter, but also a failure of issue male of his daughter, taking an interest under the will whenever that might occur. The fee never was disposed of up to the period of the proviso, but it was dealt with afterwards ; the testator wished to provide for all possible cases before the estate should descend to the right heirs. The Court of Queen's Bench thought that there was a seisin in tail male, with a remainder to the daughters in fee. The case of *Fitzgerald v. Leslie*¹ is the authority for that construction. There the testator devised his estates in a series of limitations to his first son and his heirs for ever, and failing issue of that son, to his second son and his heirs for ever, and so on ; "and failing my issue male, then to the use of my issue female, and their heirs for ever." The Court, by the operation of the last words, cut down the fee of each of the sons to an estate tail male, and held that, on failure of the issue male of the first son, the estate went to the second son, and not to the daughter of the first son. This House affirmed that decision.

¹ 3 Brown, P. C. 154.

[THE LORD CHANCELLOR.—That was not a decision of this House. The case was compromised, and the order was made by consent.]

But the Court below had in the first instance so decided, and there must have been some strong reason to produce such a compromise after appeal. The argument on the other side would make the will most capricious. It goes to this extent, that the testator intended to create an estate to the sons in tail general, but that if the daughter should die without issue male living at her death, the estate was to go over. So that the intention entertained at one time was in fact recalled and defeated at another. That is not a *reasonable construction, and it *273 renders the different parts of the will inconsistent with each other. The respondent's construction makes all the parts of the will harmonize with each other; and it is more probable that it was the intention of the testator, who knew the state of his daughter's family, to cut down the estate of her sons to tail male than to leave it in tail general, to the total exclusion of her daughters.

The testator here was aware that he had made a second series of limitations, under which his property would be diverted from the first series of limitations; he recollects what he had done with regard to the Davison estates, and he meant that under no circumstances should his own and those estates go together. His daughter's death without issue male was not the event which alone occupied his mind; he thought that not only she might die without issue male, but that she might die with issue male entitled to the Davison estates; and in either case he intended that the daughters of his daughter should then take his estates. It is no answer to such a construction as the respondents contend for, to say that the adoption of it would give the estates to his daughter's daughters, to the exclusion of the issue female of grandsons. He appears, indeed, to have intended that it should have that effect. In the first instance, the testator did not give any estate to the daughters of his grandsons; he gave to the eldest son of his daughter for life, and then with remainder to the sons of that son, but not to the daughters of that son; and he repeated this form of devise in the case of Morton John Eden. It is plain that he preferred his daughter's daughters to issue female of grandsons.

The two parts of this proviso are not so connected together as to make the words "living at her death" govern them both. The

Court of Exchequer, it is true, put that construction on *274 them; but the same Court did so on the *alternative clause in the will in *Monypenny v. Dering*,¹ and when that case came before Vice-Chancellor Wigram for adjudication,² his Honour did not approve of that construction, but treated the two clauses and the two events as distinct from each other, and the Lord Chancellor, on appeal, affirmed the decision of the Vice-Chancellor.³

The intention of the testator is clear; and being so, the House will not feel itself bound by the use of particular words in the will to defeat that intention. On the contrary, all Courts will do what they can to give effect to that intention. It will be best effected by construing the will thus: "If my daughter shall have no issue male entitled by the true meaning of this my will to my real estates, then I give them over." The estates were clearly given on the condition, not only that she had issue male, but such issue male as were not capable of inheriting the Davison estates. In *Mellish v. Mellish*⁴ such a construction was adopted. There the testator said: "Hamelts to go to my daughter Catherine Mellish, as follows: in case she marries and has a son, to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter." The Judges there did not limit the effect of the words so as to make "at her husband's death" govern the having or not having a son, but applied them generally. The same thing was done in *Bifield's Cuse*,⁵ where the words were, "devise to A., and if he dies, not having a son, then to remain to the heirs of the testator"; and that mode of construction was adopted by Lord Hale in *King v. Melling*.

If the words "living at her death" are not *275 imported into the second clause of the *proviso, and there is no authority for so importing them, the respondents are entitled to judgment.

The grammatical reasoning of the Court below on the construction of the words used in this will was correct. The form of the proviso is that of a clear disjunctive; and the restriction as to

¹ 16 M. & W. 418.

² 2 De G. M. & G. 145.

³ 7 Hare, 568, 597.

⁴ 2 B. & C. 520.

⁵ Hil. 42 & 43 Eliz. cited by Lord Hale in *King v. Melling*, 1 Vent. 231.

time, which is operative as to the first part of it, has no application to the second.

No argument as to the construction of the will, under the events which have occurred, can be drawn from the fact that a power of appointment was given to Lord Eden. That power, like the final gift to right heirs, was merely a general provision to meet all possible contingencies, and implied a previous failure of every limitation in the will itself.

The daughters have taken a remainder in fee expectant on the determination of the previous estate. The precedent gifts are cut down to an estate in tail male, and there is no rule of law which prevents that from being done; all that is required in such a case is, that the Court should see that such was the real intention of the testator. It cannot be doubted that it was his real intention here. He made an alternative disposition of his property. He described "issue male" with reference to time in the first clause of the proviso, but in the second he omitted the reference to time, and described issue male not with reference to time, but with reference only to qualification.

Mr. Malins, in reply. — It is a mistake to suppose that the fee simple was not disposed of; it was disposed of in the gift to the testator's daughter; and the subsequent estates to the sons and their issue were estates in remainder. The construction contended for on the other side produces this absurdity, that if there had been but one son and one daughter of Lady * Eden, * 276 Sir Robert, the son, would have been tenant for life, with a contingent remainder in tail male to his issue; but in default of male issue, the estate would have gone to his sister, who would have had a vested remainder in fee.

The estate of the testator, on the death of Lady Eden, descended to Sir R. Eden, her son, who was her heir at law; and because it so descended to him, he had power to dispose of it; and Sir W. Eden, the appellant, thereby became entitled to it. *Monypenny v. Dering*¹ does not touch the present case, for here the question is not whether there is a gift in an alternative event, but what that event is. Nor does *Mellish v. Mellish*,² or any one of that class of cases, apply to the present.

¹ 16 M. & W. 418, 7 Hare, 568, 2 De G. M. & G. 145.

² 2 B. & C. 520.

THE LORD CHANCELLOR. — This case comes before your Lordships on a difficult point, the Court of Exchequer and the Court of Queen's Bench having, on the case being sent by the late Master of the Rolls, given conflicting opinions upon it. The whole depends on the true construction of the will of Peter Johnson ; to understand which it is necessary that you should bear in mind also the provisions of the previous will of Mr. Davison. That gentleman's will was dated in 1769, and in default of his own issue he gave his estates to Sir John Eden for life, with remainder, if there should be more than one son of Sir John, to the second son in tail male, with remainder to the third and other sons in tail male, except his eldest son, severally and successively. So that he did not intend to provide for the eldest son of Sir John Eden, but only for the second and other younger sons of that gentleman successively in tail male. He then inserted in his

will a proviso, that if the baronetcy should descend to the

* 277 *second or other younger son of Sir John Eden, the estate limited to him should be void as if he was dead. Mr. Davison meant, therefore, that nobody who succeeded to the baronetcy should take his estates ; but he meant that otherwise the course of succession, excluding the eldest son, or him who from time to time should become the baronet, should be to the sons of Sir John Eden successively in tail male.

Mr. Johnson, whose only daughter married Sir John Eden, made his will ; and he also had his views. His daughter, Lady Eden, was living at the time that he made his will ; but she died in his lifetime, namely in 1792. She had two sons living at the time that this will was made and at the time of her death ; but her issue male ultimately failed in 1844.

The will of Mr. Davison is exceedingly simple ; the other is not so. The latter was drawn by a person who had undoubtedly some knowledge of conveyancing, but not sufficient to carry out what probably were the intentions of this testator. He gives his real estates to his wife for life ; then he gives them to his daughter, the wife of Sir John Eden, for her life ; then, in the ordinary way, to his grandson, Robert Eden, the eldest son of his daughter and of Sir John Eden, for life, without impeachment of waste ; and then he gives in effect the same estates to the first son of the body of Robert Eden, and the heirs of the body of such first son ; " and for default of such issue, to the second, third, and every other son



of the body of the said Robert, severally and successively, and the heirs of the respective bodies of such second, third, and every other son ; the elder of such sons, and the heirs of his body, always to be preferred and take before the younger of them and the heirs of their bodies respectively." It is a common limitation, my Lords, which may be described by the words, that * they were to take successively in tail general, and I only * 278 repeat the words in order to draw your Lordships' attention to the fact that they are regular, precise words of limitation, used in their proper technical sense. In default of such issue, he devises the estates as aforesaid to his grandson, Morton John Eden, the second son of his daughter and of Sir John Eden ; and having at that time the will of Mr. Davison fully before him, he refers to the limitations in it, and having his own intentions, just as Mr. Davison had his, takes care to preface the gift to his second grandson in a particular manner. The first gift is absolutely to the eldest son of his daughter; but the second gift, which is to her second son, who at that time would have been entitled as tenant for life under the will of Mr. Davison, is in these words : " To my grandson Morton John Eden, second son of my said daughter, for his life, without impeachment of waste, in case he shall not become or shall not continue seised of the real estates of Morton Davison, late of Beamish, in the county of Durham, Esquire, deceased, by virtue or in consequence of his will." Then he gives the estates to the sons of Morton John Eden " upon the conditions aforesaid," that is, imposing on them the same conditions which he had imposed upon the second son, just as if he had repeated those conditions. This is followed by a gift to the third and every younger son of his daughter, with words of limitation, as tenants in tail successively. The reason of that is obvious. He did not confine them to life estates, because the framer of the will, although he did not know a great deal, did know that unborn persons generally could not be made tenants for life, with remainder to their issue as purchasers.

Then comes the proviso, that if Morton John Eden, that is, the second son or any other son of his daughter, " shall at any time during his life become seised of the real * estates of * 279 Morton Davison by virtue or in consequence of his will," then Morton John Eden, the second, or such son of the body of his daughter so becoming seised thereof, should not have any in-

terest in his estate, but the estate should become null and void, as if that son was dead. His intention was not to provide for the second son, who would take the Davison estates ; and his intention further was, that if such son did take his own estates, and afterwards became entitled to the Davison estates, then the gifts of his own property should cease and become null and void. That is all very simple. There is only this difficulty. Each testator had his own object, each had a shifting clause, and in the result of the operation of the two shifting clauses it was not improbable that there might be a collision between them.

Then comes this proviso, upon which the whole case has turned; and I must say, that if it had not been introduced with so much learning and so much consideration, I should not myself have entertained any doubt whatever upon it. I say that with great respect and deference to those learned persons who have delivered opinions upon the case ; but I never could feel in my mind any doubt upon the true construction of this clause : " Provided always, that if it shall happen that my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates, hereby limited and settled as aforesaid, then and in either of those cases," he devises all his real estates to the daughters of his daughter living at the death of their mother.

Now, to stop there for a moment. This proviso has been the subject not only of great legal, but of very learned grammatical construction, and the question has been, what is the verb to

* 280 apply to the whole sentence, and how much, * if any, of the first part of the sentence should be imported into the latter part, and whether you can or not transpose any portion of this proviso ? Now, bear in mind, that up to this moment each of the sons and his issue in tail are provided for ; but the testator has not confined it to issue male. The point which has been argued at your Lordships' bar is, that by the true construction of and implication upon this will, the testator having said that, if there should failure of issue male at a given period, although he has not limited the previous limitations to issue male, but has given the in tail general, the House may, and it has been called upon, true by implication the former limitations as a gift in tail male, to cut them down to estates in tail male, and on the failing any time of male issue, to give the estates to the daughters.

For that purpose the case of *Fitzgerald v. Leslie*,¹ in the House of Lords, a case of some ancient date, was cited. I pointed out in the course of the argument that that is no authority, because the House came to no opinion upon it. Whether the opinion of the Court in Ireland in that case was right or wrong, I am not called upon to say. There were other circumstances in that case,—there were other titles made upon other grounds: it is impossible to know upon what ground the Court in Ireland decided that case, and it is utterly impossible to apply it to the present. If you give an estate to a man and his heirs, that is a fee simple; if you say, "in default of heirs of his body," then you translate "heirs" into "heirs of his body," and that makes an estate tail. But if you say, "in default of issue of his body," it is a description of the present heirs and all the heirs of his body that he ever may have. In that particular case, that was the form and frame of the will. Then at last the testator said, * "In case my sons * 281 shall die without issue male" (stating that he meant them to take successively), he gave it to the females. The decision in Ireland in that case appears to have been, that first of all you translate the word "heirs" or the word "issue" to mean "issue of the body" or "heirs of the body," and then you add the word "male" to "issue," and you find that it cuts down the estate so given to an estate tale. That may or may not be right. Your Lordships are not called upon to deliver any opinion upon that point. It is perfectly clear that no such doctrine can apply to this case, because here are regular estates in tail general limited by as apt words of limitation as any testator could use. There is no possible ground by implication to cut down the estates tail, unless you are to do it because of the mere circumstance that there is a devise over. That is not an inconsistency. When this testator had provided for his daughter and for the sons of his daughter, is there any thing inconsistent in his saying, "if the male line shall cease at a certain time, but only at a certain time, I will then provide for the daughters of my daughter, in preference to other persons who might take"? It might be a wise or an unwise disposition, but with that your Lordships have nothing to do. It is not inconsistent with what he had before done, it is upon a contingency; it does not interfere with the other devise, does not cut it down, and does not prevent it running through the whole course of the

¹ 3 Brown, P. C. 154.

limitation ; for whoever may take by force of this limitation of his will must take the entire interest given under this limitation, notwithstanding the gift over. The gift over depends upon a contingent event. The estates limited to the sons depend upon no other event than the succession in which they are to take, subject to the proviso in the will. Upon that point, therefore, my Lords, I can entertain no doubt, and shall certainly not advise your

* 282 * Lordships to at all cut down these estates by any implication.

If they are not to be cut down by implication, but you are to read the devises as they stand, let us see what the frame of the will is. The testator had provided for the sons of his daughter estates which might possibly endure for centuries, but might possibly cease in a very short time. He had in view a series of limitations, not to take effect upon the natural determination of those estates, whenever they might happen (I am speaking now in general, without reference to this particular devise) ; but he had throughout his will in view to provide what should become of his estates in case the contingent event, whatever that contingent event was, should happen at a certain period. The question before your Lordships is, whether he intended the limitations created by this proviso to take effect as remainders, or not. If they took effect as remainders, they took effect as contingent remainders, and could only arise if the event happened ; and therefore we have to inquire what the event is ; and that must depend upon the real meaning of this proviso. But whatever the event is, if that event happens at the period which he has pointed out, he then gives the estate to the daughters of his daughter. When ? At the death of the mother, if they are then living. Then the only event upon which he supposes that contingent estate can take effect is upon the mother's death, at which time he directs that intermediate limitations are to cease.

What, then, is the gift over ? In case his daughter should die without issue general living at her death, the estate is to go as she shall appoint by her will. It is shown, no doubt, that difficulties might arise as to the exercise of this power,— and so beyond all question they might ; but what then ? The contingency

* 283 is, if there shall be any failure of * issue of his daughter.

It is quite clear that that was meant to be, living that daughter, because he supposes (although he was wrong in that)

that she would then have to exercise her power. Now it has been decided many times, that a power to operate upon a contingent event, like that of a death, may be exercised in the lifetime of the party upon whose death alone that contingency can take effect; otherwise you might never exercise it at all. That is a settled point of law. But looking at the frame of this will, it is evident that he supposed that that power would start and be in existence, living his daughter. And there is a general disposition over (in case the daughter should make no disposition), subject to the provisions of his will, to his right heirs.

Now, if his daughter had survived her father, which she did not, the reversion would have descended to her. People never contemplate, nor are supposed to do so, the death, in their own lifetime, of their legatees or devisees. The testator's daughter, therefore, taking the reversion in fee, if she did not exercise her power, would then have had an estate which would have enabled her to provide for any of those classes of issue who were not provided for, according to the proper view of this case, by the regular limitations before made.

With these observations, let us just see what the common-sense construction of this clause is. [His Lordship read it.] It is said, you cannot deny that there are two contingencies contemplated. The devise is in the disjunctive. It is not if both, it is if either event should happen. There are two events in view, beyond all question; but what are those events? It is said on the one side, that you must read the first part of the clause as you find it; that it is open to no ambiguity, and therefore it does not need to be altered. Nobody can be more desirous of carrying further than the * person who is now addressing your Lordships, * 284 the rule that you are never unnecessarily to introduce and interpolate words in a will, nor ever to give a construction to any clause of a will contrary to what the plain words import, without an absolute necessity, by intention declared or evinced in some other part of the will.¹ No such necessity exists here. The event stated in the first branch of the clause did not happen. Lady Eden had two sons living at her death. The second branch of the clause goes on thus — [his Lordship read it]. It is said that you can import no words into that second branch to confine the failure of issue which is there spoken of, to a failure of issue at the death

¹ Abbott v Middleton, 7 H. L. Cas. 76, 81, 94.

of the daughter. Much criticism has been gone into in the Court below upon grammatical questions. Now, my Lords, there is one thing, as was justly observed by Lord Hardwicke, which goes further than grammar in these cases, namely, that it matters not what words come first or what words come last in a will. If the most illiterate person makes his own will, though there is not a word of correct grammar in it, yet, if you can collect the intention, you are bound to give legal effect to it. I confess I cannot feel any difficulty as to the meaning of this sentence. The whole sentence must be read together, and every part, if such be the intention, must be treated as bearing upon every other portion of it. I do not agree with the necessity for either transposition or importation of words. I see nothing to import, and I see nothing to transpose. You have only to read it in the common, plain way: "That if it shall happen that my said daughter shall have no issue male of her body living at her death, or" — this is the alternative — "no such issue male as shall be entitled under my will"; then and in either of those cases, what does the testator mean? Does

not he mean this: provided always, that if it shall happen
* 285 that my daughter shall, at her death, * have no issue male
of her body living, or shall then have no such issue male as
shall be entitled to my real estates? Why is not the restrictive
phrase to govern the two branches of the proviso? There is nothing wanting in the grammar; you make sense of the whole. The Judges of the Court of Queen's Bench say, in their criticism on the judgment of the Court of Exchequer, with respect to the relation of the verb: "We think this is a mistake. Where that which follows a transitive verb is made up of parts, either united by a conjunctive or divided by a disjunctive particle, the force of the verb equally in either case passes into both parts, making up the whole as if the whole had been unbroken." And they say in another passage: "If, indeed, the defendant is right in contending that 'living at her death' is part of the verb which governs the sentence, we admit that this argument fails: it is not then properly a transposition, but rather a bringing together the divided parts of the idea which the verb represents; and that verb will certainly govern both members of the sentence: this would follow from our own argument. But 'living at her death' is a qualification of the 'issue male'; it shows what sort of issue male the testator had in his mind; and, wherever placed, it is no more a part

of the verb than the issue male itself. It is not a part of the verb governing, but of that which is governed by it." My Lords, I do not consider this as a question of what the verb is grammatically to govern ; the question is upon the construction of the whole sentence, taken in all its parts. Can you read it without saying that this testator meant the contingent event to apply to both ? If he did, I cannot have the slightest doubt in advising your Lordships to come to the conclusion that that intention is expressed by these words with sufficient certainty.

Can anybody doubt what the intention was ? The testator * provides for the first son of Sir John Eden without * 286 any condition ; he does not provide for the second son, unless he should not become entitled to the Davison estates. That makes two classes of issue ; one which can take under his will, the other which might take under it, but may be excluded by certain events. Then what is the plain construction of the will ? The testator says, "If there shall be no male issue of my daughter living at her death." That is plain. There is no question whatever arises upon that as to the distinction between the two classes. But he saw that there might be male issue living at her death, but that that male issue might not be the persons he intended to take under the limitations ; therefore he says, "If there shall be no male issue living at her death," or (for that is the true construction) "such male issue shall not be the person entitled under my will, then I give my estates to the daughters of my daughter then living." Is not that plain enough ? I confess I cannot see any difficulty in the case. It is only from the great respect I have for the learned persons who have differed upon this point, that I should suppose it to be a case of real difficulty.

Now look again at the intention. Why was the gift to the daughters, the immediate gift that followed, confined to daughters living at the death of the mother, if these two events were not both meant to be confined to the same period ? Could a man do any thing so manifestly absurd as to give an estate over to the daughters of a daughter living at their mother's death, if there should be no male issue at any time, that male issue being persons all of whom might in succession take under his will ? Supposing that that class must include the other class, could he mean also, without having expressed it, that if that class for whom he had not meant to provide should cease at any time, that then

the property should go over? To whom? To the daughters * living at the death of the mother. Why not to the daughters living when the limitations fail? If he looked to a general failure whenever it might happen, thirty years, or three hundred years hence, why should he tie up the limitations subsequently to the death of the mother, except that he was perfectly aware that he had given over the property subject to no contingency but the death of the mother. No doubt there are two events contemplated; one is, there being no male issue at all, that is the one with which he starts, and in that case there is no difficulty; the other, there being male issue, but that male issue being incapable of taking: then he says, if they are incapable of taking, in that case I mean to prefer my daughter's daughters. That, I think, is the rational construction. There is no other way in which I can put a rational construction upon this will in all its branches, nor in which I can account for the contingencies in it. It may be that this will has been drawn by a man who was not sufficiently learned to carry out all the objects of the testator. But you must take it as you find it. We are not here to supply that want of learning; we must not do that; we have to construe that which he has done. And if the construction which I have submitted to your Lordships is the right one, all the parts of the will are consistent with each other.

Now, my Lords, it is unusual for the House to advert to, or observe upon particular passages which occur in the judgment of the Court below, from the respect due to those very learned persons with whom we may not happen sometimes to agree, but for whose opinion we must always feel the highest deference. But the Judges of the Court of Queen's Bench were themselves under the necessity, in order to justify their opinion, of examining with some minuteness the judgment of the Court of Exchequer.

In delivering their learned judgment, the Judges of the *288 * Court of Queen's Bench were perfectly aware that the testator had in his mind the two events, that is, that there might be no issue male at all, or, that there might be no issue male entitled under the will. They point that out with the greatest accuracy. The way in which they dispose of that is this: "Putting, then, the two wills together, it is obvious that the being entitled to hold one of the properties under the former was to be an exclusion from the other under the latter, and so conversely;

and further, that if at any period there was but one son of Lady Eden living after the decease of Sir John Eden, as he must be the baronet, he would on the one hand be excluded from the Davison property, and on the other, in the words of the proviso in question in the Johnson will, would be 'entitled by the true meaning of that will' to the real estates thereby limited and settled. As, then, at any given period, to have no issue male of Lady Eden's body was necessarily to have no such issue male as should be entitled to take the estates; so also to have at the same given period no such issue male as should be entitled to take was the same as to have no issue male at all."

By that refined mode of reasoning the learned Judges seem to have come to the conclusion that in point of fact there was but one contingency here, so they afterwards expressed it, with two branches. But your Lordships will observe, that here perhaps the learned Judges seem rather to have looked to the consequences of the events provided for, than to the events themselves. The testator provides for these totally different states of circumstances; the one a total failure at a given time, the other a partial failure, that is to say, a failure of such issue male as should be entitled to take under his will. The result may be the same, no doubt; but in each case it will be produced by a different event. In order to get at the true construction of * this will, in order * 289 to see what the testator intends, must you not advert to those events, must you not deal with them? The Judges of the Court of Queen's Bench, taking this view of it, seem at once to have considered the clause, although there were two contingencies expressed, as resulting into one with two branches; and that led, I think, to the decision which is complained of at your Lordships' bar.

It is observed in another passage of the judgment, that "when the will was penned, Lady Eden had two sons living, and more might be born; the event, therefore, on which the daughters were intended to take, would not unnaturally present itself to the testator's mind with reference to the two contingencies: either both or all might die without issue in her lifetime, or, they or some of them surviving her, there might be still a failure of issue male entitled to take at some later period. It is clear that he did contemplate the failure in regard to two contingencies at least; for he uses the unequivocal words 'then and in either of those cases.'"

THE LORD CHANCELLOR.—This case comes before your Lordships on a difficult point, the Court of Exchequer and the Court of Queen's Bench having, on the case being sent by the late Master of the Rolls, given conflicting opinions upon it. The whole depends on the true construction of the will of Peter Johnson ; to understand which it is necessary that you should bear in mind also the provisions of the previous will of Mr. Davison. That gentleman's will was dated in 1769, and in default of his own issue he gave his estates to Sir John Eden for life, with remainder, if there should be more than one son of Sir John, to the second son in tail male, with remainder to the third and other sons in tail male, except his eldest son, severally and successively. So that he did not intend to provide for the eldest son of Sir John Eden, but only for the second and other younger sons of that gentleman successively in tail male. He then inserted in his

will a proviso, that if the baronetcy should descend to the

* 277 * second or other younger son of Sir John Eden, the estate limited to him should be void as if he was dead. Mr. Davison meant, therefore, that nobody who succeeded to the baronetcy should take his estates ; but he meant that otherwise the course of succession, excluding the eldest son, or him who from time to time should become the baronet, should be to the sons of Sir John Eden successively in tail male.

Mr. Johnson, whose only daughter married Sir John Eden, made his will ; and he also had his views. His daughter, Lady Eden, was living at the time that he made his will ; but she died in his lifetime, namely in 1792. She had two sons living at the time that this will was made and at the time of her death ; but her issue male ultimately failed in 1844.

The will of Mr. Davison is exceedingly simple ; the other is not so. The latter was drawn by a person who had undoubtedly some knowledge of conveyancing, but not sufficient to carry out what probably were the intentions of this testator. He gives his real estates to his wife for life ; then he gives them to his daughter, the wife of Sir John Eden, for her life ; then, in the ordinary way, to his grandson, Robert Eden, the eldest son of his daughter and of Sir John Eden, for life, without impeachment of waste ; and then he gives in effect the same estates to the first son of the body of Robert Eden, and the heirs of the body of such first son ; "and for default of such issue, to the second, third, and every other son

of the body of the said Robert, severally and successively, and the heirs of the respective bodies of such second, third, and every other son ; the elder of such sons, and the heirs of his body, always to be preferred and take before the younger of them and the heirs of their bodies respectively." It is a common limitation, my Lords, which may be described by the words, that * they were to take successively in tail general, and I only * 278 repeat the words in order to draw your Lordships' attention to the fact that they are regular, precise words of limitation, used in their proper technical sense. In default of such issue, he devises the estates as aforesaid to his grandson, Morton John Eden, the second son of his daughter and of Sir John Eden ; and having at that time the will of Mr. Davison fully before him, he refers to the limitations in it, and having his own intentions, just as Mr. Davison had his, takes care to preface the gift to his second grandson in a particular manner. The first gift is absolutely to the eldest son of his daughter ; but the second gift, which is to her second son, who at that time would have been entitled as tenant for life under the will of Mr. Davison, is in these words : " To my grandson Morton John Eden, second son of my said daughter, for his life, without impeachment of waste, in case he shall not become or shall not continue seised of the real estates of Morton Davison, late of Beamish, in the county of Durham, Esquire, deceased, by virtue or in consequence of his will." Then he gives the estates to the sons of Morton John Eden " upon the conditions aforesaid," that is, imposing on them the same conditions which he had imposed upon the second son, just as if he had repeated those conditions. This is followed by a gift to the third and every younger son of his daughter, with words of limitation, as tenants in tail successively. The reason of that is obvious. He did not confine them to life estates, because the framer of the will, although he did not know a great deal, did know that unborn persons generally could not be made tenants for life, with remainder to their issue as purchasers.

Then comes the proviso, that if Morton John Eden, that is, the second son or any other son of his daughter, " shall at any time during his life become seised of the real * estates of * 279 Morton Davison by virtue or in consequence of his will," then Morton John Eden, the second, or such son of the body of his daughter so becoming seised thereof, should not have any in-

ing only for events to happen in her lifetime when he gives to her, herself the person upon whose death these matters were to depend, the power of disposition by an instrument in her lifetime, so that she would be able to provide even for those branches which might otherwise be excluded. Testators are very capricious, and they have a right to be so. You are not to consider what is best for them to do. Your Lordships do not sit here to draw men's wills or to make new wills for them, but to construe those which they have made.

I hope, my Lords, it will not be considered that I have taken an improper liberty in commenting upon the opinions of the learned Judges to which I have referred. I have thought it necessary to investigate the grounds of those opinions, in order to satisfy your Lordships' minds how far the grounds upon which I have proceeded are maintainable. I entirely agree with the decision of the Court of Exchequer. Indeed I cannot entertain any doubt upon the question. From the way in which it came before your Lordships, I think it is not a case for costs, and therefore I move your Lordships that this decree of the Court below be reversed.

Decree reversed, with a declaration.

It was Ordered, "That in the events which have happened, the daughters of Dorothea, the wife of Sir John Eden, Bart., did not, nor did any of them, take any estate under the limitations of the will of Peter Johnson, deceased, in the estates devised by the said will: And it is Ordered, that, with this declaration, the cause be remitted back to the Court below, to do therein as shall be just and consistent therewith and with this judgment." Lords' Journals, Dec. 14, 1852.

1853. March 17, 18.

MARY RUSSELL and another, *Appellants.*

THE REV. RICHARD DICKSON and others, *Respondents.*

Will. Legacy, substitutional or additional. Costs.

Where a legacy is given in each of two different instruments, the testator must, *prima facie*, be understood to have meant to give two separate legacies; but there may be circumstances to rebut that presumption.

A testator gave by his will, "To my natural or reputed daughter, M. S., 2000*l.*, for her own sole and separate use, the interest thereof, at five per cent., to be expended on her education"; and intrusted the care and charge of her to his brother. In a codicil, executed five years afterwards, he said, "I add 3000*l.* to the 2000*l.* to which M. S. is entitled under my will, by which she becomes entitled to 5000*l.*" In about a year afterwards, and about ten days before his death, he made a further codicil, in which he said, "Not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds with the sum of 20,000*l.* for my daughter, M. D. "; in this instance giving her his own name, as if she was a legitimate daughter:—
Held, affirming the decree of the Court below, that there were circumstances here to rebut the *prima facie* presumption in favour of the last legacy being treated as additional, and that it was only in substitution for the sums previously given.

There had been a previous decree, in substance the same as that which was appealed against, but made in a different suit and by a different Judge; the appeal was dismissed with costs.

STEPHEN DICKSON, late of the city of Dublin, by his will, dated the 20th of August, 1833, devised all his property, of what nature and kind soever, to trustees, in the first instance to pay all his debts and legacies, &c., and after payment thereof, in trust for several legatees; and then the will proceeded thus: "I give to my natural or reputed daughter, Mary Sheean, 2000*l.*, for her own sole *and separate use, the interest thereof, at 5*l.* per cent., *294 from the time of my death, to be expended on her education, which I wish to be continued at Bristol, or somewhere in that neighbourhood; the care and charge of her I intrust to my brother, the Rev. Richard Dickson," whom he afterwards appointed one of his executors.

The testator made a codicil to his will (executed avowedly as a codicil), dated 17th August, 1838, which, after several devises and bequests, proceeded as follows: "I add 3000*l.* to the 2000*l.* to which Mary Sheean is entitled under my will; by which she becomes entitled to 5000*l.*"

The testator made a second codicil to his will (which, however, in the execution thereof, was called his "last will and testament"), dated 12th August, 1839; but did not thereby refer to Mary Sheean. But a third codicil, dated 4th September, 1839, was in the following terms: "Not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds with the sum of 20,000*l.* for my daughter Mary Dickson, subject to the limitations and restrictions in my

will contained as to the marrying, with consent, &c. of my brother Colonel John Dickson and my brother the Reverend Richard Dickson.”¹ It concluded thus: “Signed, published and declared by the said Stephen Dickson, as his will, in our presence, this 4th day of September, 1839.”

The testator died on the 18th of that month, and all three papers were admitted to probate.

Mary Dickson, about whose identity no question was raised,
* 295 married Richard Russell, and received the sum of * 20,000*l.*,

which was disposed of in her marriage settlement in the following manner. Richard Russell received the sum of 3000*l.* for his own use, 1000*l.* went to pay legacy duty, and the remaining 16,000*l.* were vested in trustees for the separate use of Mary Dickson for life, and for the issue of the marriage; and it was arranged that if the further sum of 5000*l.* should ever be paid, 4000*l.* of it should be vested in the trustees for the purposes of the settlement.

On the 8th December, 1840, Richard Russell and Mary his then wife filed a bill in the Court of Chancery in Ireland against the executors of her father’s will, praying that she might be declared entitled to the 2000*l.* and 3000*l.* given in the will and the first codicil, in addition to the sum of 20,000*l.* given her in the third codicil. On the 7th February, 1842, a decree was made by Lord Chancellor Sugden, by which this bill was dismissed, his Lordship being of opinion that the 20,000*l.* given by the third codicil were in substitution of the two former sums. As the testator had himself created the difficulty, the costs were ordered to come out of the residuary fund.²

During the pendency of this suit, but before the decree was pronounced, a daughter, Mary Elizabeth Russell, was born, and on the 28th November, 1846, a new suit, in the names of Mary Russell the mother, and Mary Elizabeth Russell the daughter, was instituted by their next friend in the Court of Chancery in Ireland, with the same prayer as the former. On the 23d December, 1847, Lord Chancellor Brady made a decree dismissing the bill, with costs.³ This was the decree appealed against.

¹ There was nothing in the will relating to the consent of the testator’s brothers as to the marriage of Mary Dickson; but she did, in fact, obtain their consent to her marriage.

² 2 Drury & Warren, 133, 4 Irish Eq. 339.

³ 11 Irish Eq. 418.

Mr. Rolt and *Mr. Bagshawe* for the appellants. — This is a question of construction, not of presumption. * Now * 296 it is a settled rule of construction, that if a person takes one gift under a will and another under a separate instrument, both shall take effect; and of late this rule has been most strictly adhered to. The *prima facie* inference of fact is, that the person who executes two instruments to make two gifts, intends that there shall be two gifts, independent of each other, not that the one shall be substituted for the other. Roper on Legacies.¹ The case of *The Duke of St. Albans v. Beauclerk*² does not affect the present, for the doctrine there, that the gift of the same sums, made by two different writings, must be considered as repetition, is accompanied with this qualification, unless it can be shown that it was the testator's intention to make them additions. There is no legal presumption in favour of substitution. Every thing must be collected from the intention of the testator, as ascertained from the plain expressions in the will. This question was considered in *Hooley v. Hatton*,³ and again in *Ridges v. Morrison*;⁴ and in both cases the rule was adopted that two legacies, of exactly the same sums, being given to the same person, the one by a will, the other by a codicil, the legatee might take both, because of the intention of the testator. Here the intention of the testator is clear. In *Hurst v. Beach*,⁵ Sir John Leach, after commenting on errors in Atkyns's report of *The Duke of St. Albans v. Beauclerk*, says: "I think the true result of the decisions, as they apply to the present point, is to be stated thus: where a testator leaves two testamentary instruments, and in both has given a legacy *simpliciter* to the same person, the Court considering that he who has twice given must *prima facie* be intended to mean two gifts, awards to the legatee both legacies, and * it is indifferent * 297 whether the second legacy is of the same amount, or less or larger than the first; but if in such two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both instruments the same motive is expressed and the same sum is given, the Court considers these two coincidences as raising a presumption that the testator did not, by the second instrument, mean a second gift; but meant only a repeti-

¹ Vol. II. c. 16, § iii.

⁴ 1 Brown, C. C. 389.

² 2 Atk. 636.

⁵ 5 Madd. 358.

³ 1 Brown, C. C. 390, note, nom. *Hatton v. Hooley*, Lofft. 122.

tion of the former gift. The Court raises the presumption only when the double coincidence occurs of the same motive and the same sum in both instruments. It will not raise it if, in either instrument, there be no motive or a different motive expressed, although the sums may be the same; nor will it raise it if the same motive be expressed in both instruments and the sums be different."

In the same manner Vice-Chancellor Wigram, who was always careful to put his judgment on a principle that might serve as a guide in other cases, says in *Suisse v. Lowther*:¹ "The cases have expressly decided the point, that where there is nothing but the circumstance of omitting such words, [as additional,] the Court does not consider it sufficient to control that which, *prima facie*, is the meaning of the bequest. Where the mere bounty of the testator is the only apparent motive for the bequest, and no other is expressed, the rule is, that the legatee shall take in addition." *Lee v. Pain*² is to the same effect. In *Roch v. Callen*³ there was a bequest, by the will of a testatrix, of an annuity to her "servant" E. H., and by a codicil, made three years afterwards, there was a bequest of an annuity of the same amount to her servant "E. H." The latter was held to be cumulative, the words not expressing the motive, but being descriptive only. *Currie*

* 298 v. *Pye*⁴ shows that * where legacies, not of exactly similar amount, are given by different instruments, they are cumulative; and the only reason why the plaintiff there did not succeed was, that as there was a gift of pictures⁵ accompanying the money in each of the two testamentary instruments, that circumstance showed that there was in fact but one gift to him.

Here the legatee was the natural child of the testator, and in the will and first codicil he called her by another name; but before his death he had determined to recognise her, and to place her in a different position in life, and to effect that object he gave her an additional benefit under his will.

It will be said in answer to this claim, that when the testator intended the gift to be cumulative he knew how to express such an intention, and that not having done so in his last codicil, his

¹ 2 Hare, 424, 430.

³ 6 Hare, 531.

² 4 Hare, 201.

⁴ 17 Ves. 462.

⁵ In the first codicil the word is "pictures" (p. 463 of the report); in the second codicil, in p. 464, the word is "picture."

intention must be taken to have been different. But the same circumstance occurred in *Suisse v. Lowther*,¹ though it did not affect the judgment in that case. Such a difference of mere expression, where the general purport of the will does not require it, will not give a different meaning to two parts of what must be treated as the same instrument. In *Mackenzie v. Mackenzie*² there were several gifts by codicil to persons who were already legatees under the will, and they were held to be cumulative, though the intention to make them so was only expressed as to one of these parties. Particular words are not in themselves decisive. In *Wordsworth v. Wood*³ the words "my surviving children" were used in one part of the will, and "my then surviving children" in another part; but, though under particular circumstances the * word "then" might make a * 299 very important difference in the construction of a will, yet there, because the general purpose was the same, it was treated as occasioning no difference whatever.

It may be argued on the other side, that the recital, in the last codicil, of the intention to alter the will, shows that substitution was meant; but surely the argument is at least equally strong that addition was intended, and the rule of law being in favour of double legacies, the argument in favour of addition, and not substitution, is very strong indeed. That reason becomes even still stronger when it is remembered that at first the testator treated the object of his bounty as a person for whom he was in some measure bound to provide, though speaking of her with feelings not of a very kindly sort; that he afterwards improved in tone towards her, and more than doubled the amount of his gift, and then, as time wore on, and she strengthened in his good graces, he not only dropped the description of natural or reputed daughter, but changed the name of Sheean to his own, and called her "my daughter, Mary Dickson"; and then went on in the persuasion that he had provided guardianship and consent for her marriage; in which persuasion he was entirely wrong, but which clearly shows what degree of affection and interest he then took in her.

There is not in this case one of the circumstances of substitution. The gift is not of the same sum; nor, after the changes in the name and condition of the legatee, can it be said to proceed from the same motive.

¹ 2 Hare, 424.

² 2 Russ. 262.

³ 1 H. L. Cas. 129.

The Solicitor-General (Mr. Bethell) and *Mr. Giffard* for the respondents.— It is admitted that the intention of the testator is

to be “collected from the whole of the instrument,” and

*300 *Fraser * v. Byng*¹ must therefore govern the decision of this case. There is something on the face of these documents which repels this claim. First, there are variations in the language which show clearly that the last gift was to take the place of the others, and not to be in addition to them; secondly, there was a plain change of motive apparent on the face of the gift; and, thirdly, in the mind of the testator, the natural relation of the parties had been altered, from which the law will derive a presumption against additional gifts.

In the will, the gift was in fulfilment of a natural moral obligation. In the first codicil the same motive actuated the testator; but he said, “I add”; which shows that when he meant to add, he used the proper expression to effect his purpose, a matter on which Lord Alvanley, in *Barclay v. Wainwright*,² said that he laid “considerable stress.” The third codicil was made as for a legitimate daughter, and he avowed, in naming and describing her, the change that had taken place; and his gift then became one in discharge of acknowledged parental obligation. That circumstance brings it within the operation of another class of cases. When the testator here stood *in loco parentis*, then the rule against double legacies applied. *Osborne v. Duke of Leeds*,³ and *Powys v. Mansfield*.⁴ The testator spoke of altering his will, a phrase applicable to substituting one legacy for another, but not applicable to adding one to another. He spoke of not having time, and wishing to guard against risk; he meant that if he had had time he would have obliterated all he had before written about his natural daughter, Mary Sheean, and instead of giving her 5000*l.* as his natural daughter, would give her 20,000*l.* in a different character.

*301 What was the risk to be *guarded against? There was none, if the gift was in addition; for he had only to say, “I add 20,000*l.* to what I have already given.” The risk was, that in the pressure of time and of illness he might not make all the parts of the will agree together; but to avoid the risk of that, he gave 20,000*l.* in one lumping sum to a lady he had then determined to recognise as his daughter. *Mackenzie v. Macken-*

¹ 1 Russ. & M. 90.

² 5 Ves. 369.

³ 3 Ves. 462.

⁴ 3 Mylne & C. 359.

zie,¹ cited on the other side, does not apply here; for in that case there were circumstances stated in the will itself, which required the construction there given to the bequest. No such circumstances exist here.

The principle on which this case is to be decided is clearly stated by Lord Alvanley, in *Allen v. Callow*.² It was there decided that the rule that legacies to the same persons by different instruments shall be accumulative, is repelled by intrinsic evidence of intended substitution. The same principle had been long before adopted, though not expressed, in *The Mayor of London v. Russell*.³ There the testator gave 1000*l.* by will to his wife in bar of dower, and then in a codicil said: "Whereas there is 1000*l.* given to the said Michah by my former will, I do now give 1600*l.* and whatsoever is in my former will to my wife; that my former will shall stand in full force notwithstanding the codicil"; and the Court held that a different intention was shown as to the sum, but as to nothing else, and that the wife was only entitled to the 1600*l.* The case of *Currie v. Pye*⁴ shows what slight circumstances will prevent the inference that a second legacy is given in addition. There the fact that a picture was given with the money was held to show that the second gift was not additional. *Campbell v. The Earl of Radnor*,⁵ and *Coote * v. Boyd*,⁶ are to the same effect. * 302 In *Kidd v. North*,⁷ an instrument which contained the description, "This is the last will and testament," but which was not signed, was held to create a substitutional gift on two grounds: first, that it described itself as a last will and testament (which is the case here with the third codicil); and next, that it contained a direction to pay debts.

A gift that is additional must have all the incidents of the original, unless there is something in the words to distinguish the one from the other. There is no pretence here for saying that there is any distinction between the property which is charged by the will and the first codicil, and that which is charged by the last codicil. On that point, therefore, no reason exists for treating this as an additional legacy. In *Moggridge v. Thackwell*,⁸ Lord Thurlow explained the principle upon which legacies must be determined to

¹ 2 Russ. 262.

² 3 Ves. 289.

³ Cas. temp. Finch, 290.

⁴ 17 Ves. 462.

⁵ 1 Brown, C. C. 271.

⁶ 2 Brown, C. C. 521.

⁷ 14 Sim. 463, 2 Phill. 91.

⁸ 3 Brown, C. C. 517.

be additional or substitutional, and he put it upon the intention of the testator. Here the intention is clear. The testator would not have needed time to alter his will, if he had merely intended to make an addition to it; and if the instruments executed by the testator are all looked at, it is plain that the last thing he called his will contained all that he intended should be so treated.

Mr. Rolt in reply. — There is nothing in the argument that, at the time of the last codicil, the testator was fulfilling the obligation of a parent, whereas when he made the first, he was merely discharging a moral obligation. On both occasions the motive was the same, though the intensity of it was different; it had become stronger by time and by his approval of the legatee's con-

* 303 duct. In *Currie v. Pye*,¹ which was * relied on by the other side, it was no slight circumstance that prevented the Court from giving effect to the codicil as an addition to the will, for in that case there was a gift of a sum of money and a gift of a picture, and these gifts were repeated almost in the same terms by the two instruments. There it was observed that the testator must have intended one as a substitution for the other, for the same picture could not be given twice over, and it was impossible to divide the sentence and to say that the picture was given once, but that the money was given twice. In other respects that case may be considered as an authority for the appellant, for it shows that only those legacies which are exactly similar, when given by different instruments, are substitutional. In *Fraser v. Byng*,² too, one of the gifts was clearly a substitution for the other, the nature and character of the two being different. In *The Mayor of London v. Russell*,³ the testator made an addition of 600*l.*; but that being after a recital of what he had previously given, the 1600*l.* were clearly in substitution, and not in addition, to the original gift of 1000*l.* In these cases, therefore, circumstances enabled the Court to discover the intention of the testator. No such circumstances exist here; while, on the contrary, the wish of the testator to accumulate gifts on his daughter is plainly apparent.

THE LORD CHANCELLOR (LORD CRANWORTH). — This case comes before your Lordships under somewhat unusual circumstances.

¹ 17 Ves. 462.

² Cas. temp. Finch, 290.

³ 1 Russ. & M. 90.

It was originally brought before my noble and learned friend (Lord St. Leonards), when he was Lord Chancellor of Ireland, in the year 1842, upon a bill filed by the husband and wife, claiming the sum of 5000*l.*, in addition to the 20,000*l.* which they had already * received. The case was determined against the * 304 claim. That decree was acquiesced in at the time, but a child was afterwards born, the funds bequeathed had to be settled, and the child and the mother, by her next friend (the husband not then joining in the suit), filed a new bill, alleging the improper constitution of the original suit, and claiming exactly the same rights as had been claimed by the mother in the former suit. The case came on to be heard by the Lord Chancellor of Ireland who succeeded my noble and learned friend, and was disposed of in the year 1847. The matter was argued very fully before him, and considered by him, and he came to the same conclusion at which my noble and learned friend had arrived in the former suit. He was of opinion, as his predecessor had been, that there was no claim on the part of these parties to more than 20,000*l.*; in other words, that the sum of 20,000*l.* was a substitution for the two legacies of 2000*l.* and 3000*l.*, and not an addition to them.

I do not at all mean to dispute the principle, neither do I apprehend my noble and learned friend questioned it, that where a legacy is given to the same party in each of two different instruments, a will and codicil, or two codicils, *prima facie* you must treat them as two gifts. That is an obvious proposition. If the party has twice said he gives, he must be understood to mean to give twice; but of course there may be circumstances to show that the *prima facie* construction is not, in the particular case, the construction to be adopted. What the circumstances are that are sufficient to outweigh the *prima facie* presumption is extremely difficult to be determined by any rule of *à priori* reasoning. Very small circumstances have sometimes been acted on as sufficient to take the case out of the general rule. Some were adverted to in the argument before us; some were treated as too small to be considered worthy of notice by Mr. Rolt in * his reply; but they struck my mind as being very important, and such as could leave no doubt upon it. Where, for instance, there was a legacy of 1000*l.* given by two successive codicils, and it was in each case coupled with the gift of a picture, such a legacy could not be meant to be a cumulative legacy; it

was only one thing, and therefore, though money was associated with the picture, the two papers were held to create only one gift. There are many other cases which have passed on that principle.

The question here is, whether there are circumstances to show that the sum of 20,000*l.* given by the codicil of 1839 was a substitution for the 2000*l.* given by the will, and the 3000*l.* given by the codicil, or was an addition to them. The rule I have before mentioned is contended for here, namely, that the third codicil, giving the 20,000*l.* must be taken to give that sum as an addition to the 2000*l.* and the 3000*l.* previously given by the will and codicil. Is there any thing in this case to make that rule applicable, or to take it out of its operation? My Lords, I have arrived at the conclusion at which my noble and learned friend opposite and the present Lord Chancellor of Ireland have arrived, that there is something to take this case out of the application of the rule I have mentioned. I do not pay much attention to the distinctions that have been relied on by the counsel at the bar. The way the matter stands is this: by the will the testator gives 2000*l.* "to my natural and reputed daughter, Mary Sheean, for her own sole and separate use." Then by a codicil, five years afterwards, he says, "Add 3000*l.* to the 2000*l.* to which Mary Sheean is entitled under my will, by which she becomes entitled to 5000*l.*" Then comes another instrument, which is not in the form of a codicil, but which is published as his last will and testament. It is

not material to this case, as it relates only to the disposal of
* 306 estates purchased since he *executed his will. Then comes

the codicil in question, which is truly and in point of law a codicil, though it is not in terms one, being likewise declared to be signed and published as a "last will." The testator died a few days afterwards. What are the words he here uses? [His Lordship read them.] He entirely mistakes as to the fact that there had been nothing in the will about her marrying with the consent of her uncle; there had been something which he probably thought had reference to that matter, but which really only related to placing her at school with the consent of the uncle, though having no doubt forgotten what it was, he imagined it to be a restriction as to marrying without his consent.

I do not pay much attention to the circumstance that this instrument is not called a codicil, but is published as his will; and

the reason is, because the preceding codicil had been signed and published in the same way. I pay, therefore, little attention to that, as indicating any difference in this last instrument, but it is not wholly to be disregarded. There might have been a reason or his doing that in the preceding codicil. It may be that that was intended to be described as his will, not merely as a codicil to his will, in order to show that it was meant to be a distinct and separate instrument, relating to a distinct and separate property dealt with in that instrument alone; and as that property was a newly purchased estate of freehold, he might desire to deal with it in a separate instrument which should go with the muniments of that estate. There is really very little in that. What does appear to me to be of importance, as distinguishing this last codicil from that which preceded it, is this, that it begins, "Not having time to alter my will," which I interpret to mean, "not having time to alter the whole of my will, to reconstruct and remake my will over again, but intending to do so, and desiring to guard *against any risk, I do it *quoad* my natural *307 daughter, whereby I charge the whole of my estates and property in the Funds with 20,000*l.* for her." I take the testator to mean this: "I have not time to do that which I should wish to do if I had more time, namely, to make a new will altogether, and in that sense to alter my will; not having time to do that, I do however alter it to this extent, so far as it relates to the interests of my natural daughter. I alter it in this way, that I charge my property with 20,000*l.* for her." That appears to me to be an alteration in the strict sense of the words, and cannot be an addition, and therefore, upon that ground, it appears to me the parties who claim the 5000*l.* in addition to the 20,000*l.* claim something to which they are not entitled; and consequently, that the only decree that we have to deal with, namely that of 1847, was quite right in dismissing the suit, and must now be affirmed.

LORD ST. LEONARDS.—I agree with my noble and learned friend, that the decree of the Court below must be affirmed.

When the case first became before me in Ireland, it was one on which I never was able to entertain the slightest doubt. The testator had a natural daughter. By the first testamentary instrument he gave to this child the sum of 2000*l.*, describing her "as his natural or reputed daughter, Mary Sheean," not by his own

name, but by the name, probably, of her mother, and, so described, he gave her 2000*l.* for her own sole and separate use. The interest of 5*l.* per cent., to be added from the time of his death, was to be expended on her education, which he wished to be conducted at Bristol, or somewhere in the neighbourhood ; and he gave the

charge of her to his brother. As she advanced in years, by

*308 another codicil (for he made these * codicils from time to time), he expressly added a bequest of 3000*l.* to the one of 2000*l.*, to Mary Sheean, calling her his daughter, by which she became, as he says in the codicil, entitled to the sum of 5000*l.* Up to that time he was treating her, therefore, simply in the character of his natural daughter. In the second codicil he says, "I add" the sum, which is not an immaterial circumstance, because it shows that when he meant addition he knew how to express it : but up to that time he did not acknowledge her as his legitimate daughter, — he could not certainly make her legitimate by any acknowledgment of his, — but he did not adopt her into his family. In the second codicil he does not even state that he considers her as his daughter. As far as the facts appear, I collect that he must have been in a dangerous state of health when he made his last codicil : it was made on the 4th of September, and he died within ten days afterwards. He calls it a will, and a partial will it is, but that explains the circumstance of his anxiety to alter, — for he meant to alter that which he had already done. The words are these — [his Lordship read them]. Without looking to any rule of law, I am now merely seeing what was his intention. Finding the hand of death near him, and having in a measure stigmatized his daughter by calling her his illegitimate daughter, he meant to place her before the world, as far as he could, in the situation of his actual daughter ; he adopted her, and acknowledged the relation in which she stood to him, without any thing painful to her or to those who might become connected with her, from his description of her. How differently was she treated. She was then treated as a daughter. He was a man of considerable property, and instead of giving her 2000*l.*, as he had done in the first, and 3000*l.* more, as he had done in the second codicil,

he gives her 20,000*l.* at once, charged upon the whole of his

* 309 property. What, then, was *the change of intention?

While he treated her as an illegitimate child, he gave her the portion of an illegitimate child ; when he adopted her into

his family, and acknowledged her before the world as his daughter, he meant to place her in the situation of his daughter, and gave her what might be considered for any young lady a very considerable fortune, he gave her 20,000*l.* Could he imagine that his daughter, whom he thought he had honoured by placing her before the world as his daughter, would fall back on the disagreeable description under which she would be found mentioned in the will and the first codicil, and would after his death come forward and say, "First, I come as Mary Sheean, the natural daughter of the testator; pay me the 2000*l.* and pay me the 3000*l.*"; and then, after she has received that, say, "Now I come in the character of Mary Dickson, the acknowledged daughter of my father; pay me the 20,000*l.*"? It would be rather singular to see her giving receipts for these different legacies, one in the name of Mary Sheean, as the illegitimate daughter, the other in the name of Mary Dickson, the legitimate daughter; and if any thing could have disturbed this gentleman in his grave, it would have been the notion that the young lady ever would have set forth such a claim as she has attempted to establish in the different stages of this cause.

It appears to me,—I am now speaking simply of the intention,—that there could be no doubt about the intention of the testator. He says, "I have no time, death is pressing heavily on me, I want to alter my will, but I will not run the risk of altering my will." Does any man believe that if he had run that risk, he would have repeated those legacies which he had given to her as his natural daughter? Every man of common sense knows that no such thing would have taken place. Can any man believe that, if he had been able to frame a regular will, and introduce his *daughter, as apparently he gladly would have done, * 310 by his own name, as his acknowledged daughter, he would have given her the 2000*l.* and the 3000*l.*, and then the 20,000*l.*? In his view she had changed her character; changing her character, she had changed her position; changing her position he changed her fortune. He never meant that what he had given to her in the one position should be given to her in another position. In the one character he gave her a small sum, in the other a large sum: she must take the one character or the other, she cannot take both. This accounts for the words "Not having time to alter my will." I have got the report before me of what fell from me

when I decided this case in Ireland, and I see I expressly put it on the very ground which has been adverted to by my noble and learned friend, namely, that it was an alteration of the will, and that if he had had time, he would have made a new will, and the new will would have contained what appears in this, which was to supply the place of what he could not at that moment feel sure he should have time to prepare, namely, a new will. I put it twice upon that express ground. The question then is, how is this reconcilable with the rule of law? I was very careful in what fell from me, as I always am, not to break in upon any rule of law. I considered myself at liberty, without trenching upon any rule of law, or breaking in upon any decision, to determine this case upon the intention. There is no rule of law that prevents a Court from looking to the intention. Every case that you open says, If you find the intention, you are at liberty to act upon it; and the simple question in this case is, Do you or do you not find the intention? Of that I have already spoken. Then there is no difficulty about the rule of law. There is no case exactly like this, nor is it likely that exactly such a case should frequently occur. You must depend upon the principle. If you can

* 311 find * within the four corners of the instrument an intention, not that the legacy shall be cumulative, but that it shall be substitutionary, you are at perfect liberty to act upon that intention; you are not only at perfect liberty, but you are bound by law to give effect to it, provided only that it does not contravene any existing rule of law.

There may possibly be persons who would not come to the same conclusion on the construction of this will, but hitherto all opinions have been unanimous on that point. The case has been frequently quoted since it was decided, and never with disapprobation.

This case took a very singular turn. It was decided by me in Ireland in 1842. This young lady received the 20,000*l.* after the decision, and not only received that sum, but, as the father had adopted her and placed himself *in loco parentis*, I gave her interest, according to the rule of Court, on the 20,000*l.*, which I should not have been at liberty by the rule of Court to do, if I had adopted a different construction of the will. She took the principal and the interest, and then, seeming to find fault with the decision, and having a child born, she filed a new bill. That bill came before my learned successor, the present Lord Chancellor of Ireland; it

was argued at great length by the first counsel at the Bar there, three on one side, and four on the other; thirty-six authorities were cited, and he came to the same conclusion which his predecessor had done, and, after a fortnight's time taken for further consideration, he adhered to the opinion he had at first expressed. The whole argument was addressed to the very decree against which there had been no appeal, and had reference only to the judgment, against which there is no appeal. It is well as it has happened, that the House has come to this decision, for otherwise we should have been in much embarrassment to know what to do with the case, because, if the decree of 1847 had been reversed, the decree of *1842 would still have stood, and *312 would have bound the parties to that suit. Fortunately, it has happened that that embarrassment has not taken place, and I entirely agree in the opinion expressed by my noble and learned friend. Upon the first hearing, the lady had her costs out of the funds. On the second bill being filed, the present Lord Chancellor of Ireland dismissed the bill, with costs; and I apprehend that this appeal should also be dismissed, with costs.

The Order afterwards entered on the Journals directed that "the appeal be dismissed, and that the decree of the 23d December, 1847, complained of in the said appeal, be affirmed, and that the appellant do pay to the respondents the costs incurred in respect of the said appeal."

Lords' Journals, 18th March, 1853.

March 3.

THE SCOTTISH MARINE INSURANCE COMPANY v. TURNER.

This case arose out of the same circumstances as that of *Stewart v. The Greenock v. Marine Insurance Company* (reported ante, Vol. II. p. 159), and was a consequence of the decision there given. By that decision, the underwriters on ship, who had been compelled to take to the vessel, upon abandonment by the owners, and to pay as on a total loss, were declared entitled to the property in the vessel, and all the incidents belonging to the same, of which freight was one; and freight having been actually earned, they were held entitled to the benefit of it in account with the owners. The owners, having thus suffered a total loss of freight, brought an action against the underwriters on freight, to recover the freight insured. The Court of Session gave judgment in their favour. The decision of that Court was brought by appeal to this House. The judgment of the Court of Session was reversed; for, the condition of the policy being that

freight should be earned, and the freight having been actually earned, the condition of the policy was held to have been fulfilled; and the fact that the freight was paid, not to the owners of the ship, but to the underwriters on the ship, was held to make no difference in the matter. For the report of this second case, see 1 Macqueen's Appeal Cases from Scotland, p. 334.

1853. February 25; March 3, 7; April 5.

Ex parte JAMES WHITE, ROBERT COURtenay, GEORGE KERNAN, and THOMAS READ MILLIKEN, in re HENRY TOMMEY v. The said JAMES WHITE and others.

Practice. Rehearing. Costs.

A judgment of this House given on an appeal cannot be reversed; but where such appeal and judgment have been obtained by suppression and misrepresentation, the House will afterwards discharge the order granting the leave to appeal and the order constituting the judgment thereon.

A decree in Chancery was made in January, 1835, and enrolled in May of that year. A petition for leave to appeal against it (the proper time for appealing having gone by) was presented in February, 1839, and refused. The party who was dissatisfied with the decree filed a bill of review in 1844. A demurrer to that bill, for want of equity, was allowed. The order allowing the demurrer was appealed against in 1846, and in the appeal the original decree was expressly complained of. In July, 1847, there was a general dismissal of the appeal, and the order allowing the demurrer was specially mentioned in the order of dismissal; but the original decree was not mentioned. In 1848 there was a petition for leave to appeal against the original decree and certain other orders made in the course of the proceedings, but which had not then been enrolled, and in the petition it was stated that "it appeared by the order of July, 1847, that the decree of January, 1835, had not been complained of, and therefore that their Lordships had not made any declaration with respect to it," and that "the said decree had never been adjudicated upon by their Lordships." On this petition, and after other proceedings taken, leave was given to include in the appeal the decree of January, 1835. The appeal was heard *ex parte*, and in June, 1850, the decree was reversed:—

Held, that this reversal had been obtained by suppression and misrepresentation, and the parties affected by it having petitioned for relief, the House discharged the order giving leave to appeal against the decree of January, 1835, and the order which had reversed that decree.¹

No costs were given.

¹ See *The Queen v. Saddlers' Company*, 10 H. L. Cas. 431, note.

IN May, 1832, Tommey took the lease of an hotel in Sackville Street, Dublin, for thirty years. In May, 1833, * he assigned this lease and his stock in trade to White, Courtenay, and Kernan, in trust for his creditors. Under certain circumstances¹ the trustees were to have a power to sell, giving three months' notice. They claimed, on the 5th of April, 1834, to exercise this power; but as Tommey resisted, they, on the 9th of that month, filed a bill against him in the Court of Chancery, in Ireland, for a sale, the appointment of a receiver, and an injunction. On the 25th of April, 1834, the Master of the Rolls made an order for a receiver and an injunction (this order was not enrolled till the 18th June, 1849), and on the 15th May, 1834, an order for a writ of assistance to put the receiver into possession. On the 30th of January, 1835, Lord Chancellor Sugden made a decree for the sale, reserving further directions. The sale took place accordingly. This decree was enrolled by the trustees on the 20th of May, 1835. On the 3d of June, 1836, Lord Chancellor Plunket made a decretal order, founded on this decree. In 1837, Tommey filed a cross bill, in the nature of a bill of revivor and supplement, which was dismissed for want of prosecution. On the 19th of June, 1837, Tommey petitioned to have the property sold restored to him. On the following day Lord Plunket heard and dismissed this petition. In February, 1839, Tommey petitioned this House for leave to appeal against the decree of the 30th of January, 1835, the standing order 118 preventing him from bringing an appeal without special leave given, as more than three years had elapsed since its enrolment. Leave was refused. In March, 1839, Tommey petitioned the House that the order of the Appeal Committee might be rescinded, declaring that he desired to appeal against the decision of Lord Plunket,

*made on the 20th of June, 1837, by which a return of the property sold had been refused. Leave was granted, and an appeal was accordingly presented against his Lordship's order. This appeal was heard *ex parte*, and was dismissed.² In June, 1844, Tommey filed a bill against White, Courtenay, and Kernan, for review and reversal of the decree of 30th January, 1835, he having previously filed a supplemental bill, which was

¹ See them and all the proceedings fully set forth in the report of previous appeals in this case, 6 Clark & F. 786, 1 H. L. Cas. 160, and 3 H. L. Cas. 49.

² 6 Clark & F. 786.

dismissed for irregularity and non-compliance with the general orders of the Irish Court of Chancery.¹ The defendants demurred to this original bill of June, 1844, for want of equity, and on the 30th of January, 1845, the Master of the Rolls made orders allowing the demurrer with costs. An appeal against this order was presented to Lord Chancellor Sugden, who, by an order of the 14th of February, 1845, affirmed that of the Master of the Rolls. In February, 1846, Tommey presented to this House an appeal against these orders of 1845, and also against the decree of January, 1835, which appeal was heard *ex parte* the appellant, and was dismissed;² but the order of dismissal, dated 8th July, 1847, did not expressly mention the decree of January, 1835, but dismissed the appeal and affirmed the orders of January and February, 1845. On the 3d of April, 1848, Tommey presented a petition to the House to be allowed to appeal against the decree of January, 1835, the orders of April and May, 1834, and the decree of June, 1836, the last three not having been then enrolled. This petition set forth, "That your petitioner is advised to appeal from the said several decrees of the 30th January, 1835, and 3d

June, 1836, and from two orders of the Master of the *316 Rolls *in Ireland, dated respectively the 25th April, 1834,

and 15th May, 1834, mentioned in the said first decree, and which said last-mentioned orders have not been enrolled. That by an order of this Right Hon. House, dated 5th February, 1846, it appears that an appeal was brought on your petitioner's behalf, 'complaining of a decree of the Court of Chancery in Ireland, of the 30th January, 1835 (which said decree was enrolled on or about the 17th day of April, 1835), also of two orders, on demurrer, of the Master of the Rolls in Ireland, dated respectively the 30th January, 1845, and also of an order of the said Court of Chancery of the 14th of February, 1845'; and praying your Lordships to reverse the said decree, and also to reverse the said several other orders appealed from. That by an order dated 8th July, 1847, your Lordships were pleased to order, 'That the said two orders on demurrer of the Master of the Rolls in Ireland, dated respectively the 30th January, 1845, and the said order of

¹ 6 Irish Eq. 303.

² 1 H. L. Cas. 160. Tommey denied that in the appeal of 1845 the decree of January, 1835, was included; but see 162, note, where the "Reasons" for appeal given by Tommey are quoted.

the Court of Chancery in Ireland, of the 14th February, 1845, complained of in the said appeal, be, and the same were thereby affirmed'; that it appears by the said order of the 8th of July, 1847, that the said first decree of the 30th of January, 1835, was not complained of in the appeal presented on your petitioner's behalf on the 3d of February, 1846, and therefore your Lordships have not been pleased to make any declaration, with respect to the decree mentioned, in the order of the 5th February, 1846, as having been appealed from. That the said several decrees and orders which form the subject of your petitioner's new appeal have never been adjudicated upon by your Lordships." The Appeal Committee, on the 23d of May, 1848, gave leave to Tommey to appeal against the decree of 1836 and the orders of 1834, with liberty, when the appeal should be before the House, to make application to include therein the decree of 1835. In June, 1848, *Tommey presented his appeal, and made the *317 application thus permitted, and in September, 1848, a Report of the Appeal Committee, recommending that he should be allowed leave to amend his appeal by including the decree of January, 1835, was agreed to by the House. The appeal was amended accordingly, was heard *ex parte* on the 18th of June, 1850, and on the 2d July, 1850, judgment was pronounced, reversing all that had previously been done.¹

On the 22d of July, Messrs. White, Courtenay, and Kernan, who had taken no part in the proceedings in this House, presented a petition for rehearing of the appeal; which petition was, on the 25th of July, refused to be entertained by the House.² They afterwards presented a petition praying that they "might be heard in opposition to the amended petition and appeal of the 27th of June, 1848, and in support of the several decrees and orders therein complained of, notwithstanding the order of the 2d of July, 1850, and that for that purpose there may be a rehearing of the said amended petition and appeal, &c., &c., and that your Lordships will grant to your petitioners such further or other relief in the premises as to your Lordships, in your great wisdom, shall seem meet and the circumstances of this case shall require." Tommey presented a counter petition, praying the House, in substance, to dismiss their petition.

The House, on the report of the Appeal Committee, granted the

¹ 3 H. L. Cas. 49.

² 3 H. L. Cas. 68.

petitioners leave to be heard, by one counsel on a side, on the subject of this petition, for relief against the appeal of 1848, and the proceedings thereon.

Sir F. Kelly (with whom was *Mr. F. S. Reilly*) for the petitioners. — The House will afford the petitioners a remedy for the great injustice which the reversal of all the previous proceedings * has inflicted upon them. That reversal was obtained by a fraud upon the House. The petition of April, 1848, misrepresented the facts on which the leave to appeal was asked and was afterwards granted. There had been an adjudication of this House on the decree of January, 1835, and the statement in Tommey's petition to the contrary was a misrepresentation. It is true, that in the order of the House made in July, 1847, upon his appeal of February, 1846,¹ that decree was not mentioned by name, but that adjudication was a general dismissal of the appeal. Now that appeal expressly and by name included the decree of January, 1835. Tommey, in his petition, said, "The appellant is advised that the decree of 30th January, 1835, is erroneous," and distinct "reasons" were submitted to the House to show that it was erroneous, and ought to be reversed.² The bill of June, 1844, had been filed expressly as a bill of review for the reversal of that decree, and when the demurters to that bill were allowed, and the allowance of them was appealed against, the decree was necessarily, as well as in terms, made a subject of consideration, and the dismissal of that appeal was an affirmation of the decree. The statement of Tommey being, therefore, a misrepresentation of the fact, and this House having been misled by that misrepresentation, the advantage which he has thus fraudulently obtained must be taken from him. In making statements to the House, he was bound to make them truly.

[LORD BROUGHAM. — In the petition of April, 1848, Tommey does not say that he did not complain of the decree of January, 1835; but that the order of the House shows that it was not complained of.]

That was a statement calculated to mislead the House.

* 319 * In substance it was untrue; and the form of making it does not remove its untruthfulness. The orders of January

¹ 1 H. L. Cas. 160.

² See 1 H. L. Cas. 162, note.

and February, 1845, were made on demurrer to a bill which was filed in 1844, for the purpose of having that decree reviewed, and which expressly charged that decree to be erroneous. The appeal was against those orders, and that appeal was dismissed. The original decree was in substance thereby affirmed.

Then as to the supposed laches of these petitioners. They had no funds which they could employ in this long and vexatious litigation ; they had uniformly obtained the decisions of the Court of Chancery in Ireland in their favour, and those decisions, when brought up to this House, had twice been affirmed on appeal. They had therefore no reason to expect that all which had thus been done would be reversed ; and the utter poverty of the estate might well excuse them from going to the expense of appearing here to defend decrees which had up to that moment been affirmed. They could not anticipate that a fraud would be practised on this House, and that by means of that fraud all which had before been done would be reversed. The fact that such a fraud was committed ought not now to prejudice them.

There is an objection of form to the order of this House in 1850. The judgment recorded is not in accordance with that pronounced by the noble and learned Lord who moved it. In advising the House, it was said that the sale was not to be impeached or touched. But the entry is of a general reversal of the decree of January, 1835, which has the effect of setting aside the sale, and Tommey is thus enabled to dispute the title to the property conveyed under it.

[LORD TRURO.—It should have been to reverse without impeaching the sale.]

* It ought to have been so. Further : the costs which * 320 are directed to be paid to Tommey are not costs which, under the original judgment, Tommey had been obliged to pay to the respondents, or to pay at all, but are costs which are paid out of the fund in Court belonging to the creditors. If repaid at all, they ought to be repaid to the creditors ; and these costs include those which have been incurred on the judgments expressly affirmed by this House.

The petitioners pray that their petition may be entertained on two grounds : first, that the House having entertained the appeal of 1846, which was against the decree of 1835, and having in 1847

dismissed that appeal, the judgment of this House, so pronounced in 1847, may be treated as final with respect to that decree, and that there is no jurisdiction in this House again to entertain the same appeal against the same decree; secondly,—and this is the more important ground,—that the permission to include the decree of January, 1835, in the appeal of 1848, and consequently the inducement to this House to entertain that appeal, was procured by fraud, falsehood, and misrepresentation; and all the proceedings taken under it are therefore void, and the parties thereby injuriously affected ought to be let in to defend themselves against such erroneous proceedings.

Mr. Elmsley for Tommey.—The question here is, whether these petitioners are to be allowed to be heard on the merits of the case. That question must be answered in the negative. The House so decided in this very case in 1850,¹ and it did so on the authority of *Stewart v. Agnew*,² and *Cathcart v. Cassillis*.³

* 321 In the former of these cases the matter was very * fully discussed, and Lord Eldon and Lord Redesdale delivered very elaborate opinions upon it. The principle on which the rehearing must be refused is, that there must at some time be a final end to litigation. Here the natural termination of these proceedings was in 1850, when the judgment of this House was pronounced. The House has no jurisdiction now to interfere.

[THE LORD CHANCELLOR (LORD CRANWORTH).—It does not follow, that if the House thought it was at that time imposed on, it would now rehear the case; it might simply discharge the order which had fraudulently been obtained, and treat the appeal thus fraudulently heard as a nullity.]

There is no ground to charge fraud, or even misrepresentation. The decree of January, 1835, never was before this House as a Court of justice. In February, 1839, the leave to appeal against that decree was formally refused, because the time for appealing had gone by. Attempts were made before 1850 to get the opinion of this House on the decree of January, 1835, but because of the lapse of time after enrolment, leave was refused; but that decree has by subsequent proceedings been connected with others which have taken place within time, and which were, therefore, properly

¹ 3 H. L. Cas. 49.

² 1 Wilson & Shaw, 239.

³ 1 Shaw, Appeal Cases, 413.

the subject of appeal, and the decree itself was thus properly brought under discussion in 1850.

[THE LORD CHANCELLOR. — How connected with them? Suppose a person was liable to account, and a decree for an account was made and was allowed to pass without objection, and afterwards a report was made on the accounts, and some objection was raised to the report, do you mean to argue that you might then be heard to object that you were not liable to account at all?]

Perhaps not in such a case; but here if there was any irregularity it was cured by the leave given by this House * to appeal. The order of this House in March, 1839,¹ had * 322 no bearing on the decree of January, 1835, but was strictly limited to what was then formally brought before the House. The same observation is applicable to the order of the House in July, 1847,² and if so, there is no ground to charge misrepresentation, for the order shows no adjudication on the decree of January, 1835. A bill of review is filed on account of error on the face of the previous decree, or of new matter since discovered, and a demurrer to that bill may have nothing to do with the merits of the previous decree, but may be wholly foreign to it. The order of this House merely decided that the demurrer to the bill had been properly allowed. The dismissal of that appeal, therefore, did not touch the decree of 1835. If the question of time prevented that decree from being discussed in 1839, *à fortiori*, it would do so eight years afterwards. The decision of the House, and the matters on which it decides, must be looked for in the terms of the order pronounced by the House, and in that order not one word is said respecting the decree of January, 1835.

[LORD TRURO. — The order must be taken in connection with the petition of appeal; that is, the decision in connection with the record.]

Before 1848 the House had really never decided on the decree of 1835, and then, after fully debating the question of allowing Tommey leave to appeal against that decree, the Appeal Committee granted him that leave.

[THE LORD CHANCELLOR. — It is the petition, then, presented by him which is charged to be a fraud on the House, for no lawyer can read it without believing that it asserts that the decree of January, 1835, was never complained of. LORD TRURO. — And

¹ 6 Clark & F. 786.

² 1 H. L. Cas. 160.

* 323 therefore, as that decree was supposed * not to have been complained of, the committee and the House thought that it had not been disposed of. The reverse was the fact. **LORD BROUGHAM.** — It cannot be argued, because an order dismissing an appeal only specifies particular parts of the decree complained of, that therefore at any time afterwards the other parts of the decree may be brought forward as untouched by the order of dismissal.]

That may be so ; but in 1847 there never was any thing before this House but the particular orders on demurrer on which its own order of dismissal of the appeal was pronounced. Besides, whatever were the grounds on which the Appeal Committee decided, the appellant was justified in acting on its authority. The statement in the petition of April, 1848, that “ it appears by the order of July, 1847, that the decree of January, 1835, was not complained of in the appeal of February, 1846,” is not a misrepresentation ; it is a true statement : the order of July, 1847, does not mention the decree of January, 1835 ; and the appellant did distinctly convey to the House the fact that he had brought that decree under the notice of the House, but that the House had not adjudicated upon it. The order of July, 1847, establishes the truth of that statement.

[A question here arose as to whether due notice of the petition of appeal of 1848 had been given to the petitioners. Witnesses were examined at the bar on this point, and proved a service of notice on some person who was supposed to be the solicitor of the trustees, but did not satisfactorily show a service on the trustees themselves. The course which the case afterwards took renders it unnecessary to report their evidence.]

Mr. Elmsley continued. — This is in truth a petition to * 324 rehear a case already decided. * No such rehearing can be granted, unless in a case where fraud has been practised, and where the House has been directly deceived by that fraud, *Stewart v. Agnew*.¹ That is not so here, nor can it be pretended that the judgment in 1850 was obtained by any fraud of the appellant. The case was thoroughly sifted, time was taken to consider, and the date of the judgment given in the report² shows that it was not given till ten days after the argument.

¹ 1 Shaw, Appeal Cases, 413.

² 3 H. L. Cas. 62.

[THE LORD CHANCELLOR.—In the petition of June, 1848, for leave to amend the appeal by adding the decree of 1835, the appellant speaks of his “having been prevented, from the circumstances stated in his affidavit, from appealing from the said decree of January, 1835, within two years from the enrolment thereof in the Court below.” That statement shows me that the appellant did not present to the Appeal Committee the fact that he had been before refused leave to appeal against that decree.]

The mode of making a particular statement cannot be urged against the appellant, who was compelled to take his proceedings *in forma pauperis*. All the facts must have been before the committee, and the legal questions as to delay in appealing must have been fully discussed there, for it appears¹ that cases were cited and considered.

There is no objection to the form of the order; it is strictly in accordance with the judgment delivered and with the justice of the case.

Mr. Reilly (in the absence of *Sir F. Kelly*) in reply.

[LORD BROUGHAM.—It must be observed that it is not a matter of ordinary practice, when a case is to be argued by one counsel on a side, that a particular counsel shall be heard for the appellant at the opening, and another in reply.

*The House may permit such a course to be pursued, but *325 the permission is discretionary.]

Mr. Reilly then proceeded to reply.—The charge of fraud and misrepresentation is fully made out. The statements in the petition of April, 1848, were so framed as necessarily to mislead the House and the Appeal Committee, by appearing to set forth the facts, and yet not disclosing the whole truth. The fact that the appeal petition of April, 1846 (dismissed in July, 1847), had in terms complained of the decree of January, 1835, was studiously concealed, and then came the positive statement that it appeared, by the order of July, 1847, that the decree of January, 1835, had not been complained of in the appeal of February, 1846, and that “the several orders and decrees”—one of which was that very decree of January, 1835—“have never been adjudicated upon by your Lordships.” This was not merely a suppression of the truth, but a statement of an untruth. The orders of January and

¹ 3 H. L. Cas. 57.

February, 1845, were not foreign to the decree of January, 1835, for the bill of review of 1844 had been filed to set aside that decree; those orders allowed a demurrer to that bill, in substance dismissed it; and the appeal against those orders, therefore, necessarily involved the consideration of that decree, and the "reasons" in support of that appeal expressly referred to it. That decree, therefore, had been fully "adjudicated upon."

Then as to the form of the order of June, 1850.

[THE LORD CHANCELLOR.—As this petition relates to the mode in which the House was induced to make the order, the form of it need not now be considered.]

Lastly, this is not an attempt to obtain a rehearing of a
*326 case already adjudicated. *Stewart v. Agnew*¹ shows * what

would be the difficulties of an attempt of that nature. But Lord Eldon there points out that there are three exceptions to the general rule of finality of an order of this House: first, clerical error in the order itself; secondly, where a surprise has been practised by one party on the other, so that the latter has not had a fair opportunity of answering; and thirdly, where a fraud has been practised on the House itself, and its judgment thereby obtained; as to which his Lordship says, that "the judgment so obtained is an absolute nullity." The last two grounds of exception exist in this case. There was no sufficient notice of the appeal of 1848;² and the case of fraud and misrepresentation is established, beyond all doubt, against the appellant.

April 5.

THE LORD CHANCELLOR.—This case comes before your Lordships upon a petition presented under very unusual circumstances, circumstances fortunately of rare occurrence, and which I will shortly state. [His Lordship did so. On coming to that part of the statement which related to the bill of review filed in 1844, he said:] Tommey was quite justified, if he thought fit, in taking any further steps which the law enabled him to take, and consequently, in the year 1844, he filed, in the Court of Chancery in Ireland, a new bill of review, calling in question the decree of the year 1835. In order to sustain a bill of review, the party filing such a bill must be able to do one of two things. Either he must show that there is error apparent on the face of the original decree, or he

¹ 1 Shaw, Appeal Cases, 413.

² See ante, 323.

must show that though the decree appears on the face of it to be correct, yet, from matters subsequently coming to his knowledge, and which he had not the means of bringing before the Court upon the hearing of the original * cause, the decree * 327 is in fact wrong. In order to sustain a bill of review upon that latter ground, the party filing such bill is put to the necessity of filing with it an affidavit stating the truth of the matter so subsequently discovered. No such affidavit was filed here, and therefore the bill of review must be founded, if it could be supported at all, upon error apparent upon the face of the decree itself.

Such a bill was filed on the 5th of June, 1844. To that bill the defendants, the trustees, demurred, on the ground that there was no error apparent upon the face of the decree. Those demurrs came on to be heard before the Master of the Rolls in Ireland, and afterwards by way of appeal before the Lord Chancellor, and in both cases the demurrs were allowed. Both those learned Judges were of opinion that there was no error at all apparent upon the face of the decree.

In that state of things, on the 5th of February, 1846, Tommey presented an appeal to this House against those decisions pronounced by the Master of the Rolls and the Lord Chancellor of Ireland, in the year 1845, whereby they allowed the demurrs, and in that same appeal he, certainly very erroneously, did that which, if this House had been aware of it, would probably not have been permitted; he included in it, also, a complaint, by way of appeal, against the original decree of 1835, as to which the House had already refused to allow him to appeal six or seven years before. However, in point of fact, he did appeal against the decree of 1835, and against the subsequent orders. That appeal against the decree of 1835, and the orders of 1845, came on to be heard before your Lordships in the month of July, 1847, and upon the hearing the appeal was dismissed, and the two orders on the demurrs affirmed.¹ There is this distinction, undoubtedly, and * some little point was made respecting it, though * 328 I conceive it to be utterly unimportant, that the appeal was dismissed generally, and then that which perhaps was mere surplusage was added as to the orders upon the demurrs; not only that the appeal against them was dismissed, but that they were affirmed. As to the decree of 1835, nothing was said, except that

¹ Ante, 1 H. L. Cas. 160.

the appeal was dismissed. I presume the reason of that was this, that the House must have considered that though Tommey had presented such an appeal, it was altogether irregular; the House had refused him leave to present such an appeal, and therefore, being an irregularity altogether, it was dismissed, no order at all was made upon it; but an order was made in respect of the orders upon the demurrsers, which alone were regularly brought before the House on appeal. It is a mere conjecture whether that was the reason of the distinction, or whether it was a distinction which crept in *per incuriam*; what was the cause of it I do not know; but what is important is, that the appeal in which, contrary to the order of the House, or without the order of the House, the decree of 1835 had been included, was dismissed.

That took place on the 8th of July, 1847; but Tommey was not minded to acquiesce in it, and on the 3d of April, 1848, he presented another petition to be allowed to appeal against the decree of 1835, and against the orders of 1834 (which were interlocutory orders before the decree appointing a receiver, and have become perfectly unimportant), and against the decree on further directions. Now with regard to all those proceedings, except the decree of 1835, there is no order of your Lordships' House that stood in the way of such an appeal; for though a great many years had elapsed, yet the order of your Lordships' House, as it then existed, was only an order to prevent persons appealing except within a certain time after the decree or orders had

* 329 * been enrolled, a mere formal proceeding; and inasmuch

as nothing here had been enrolled except the original decree, there was no order of this House which stood in the way of an appeal against those subsequent proceedings. Consequently, what was done was this: Tommey presented his petition, stating in it as follows. [His Lordship read the petition.]¹ That is a complete misrepresentation. It was argued that all that is said is, that it appears by the order that the decree of 1835 was not complained of. Now that, I think, is fencing or quibbling in a way that your Lordships will never permit to any suitor at your bar. If you come to scan the matter in the closest way, it is a misrepresentation. It is not correct to say, that it appears by the order that the decree of 1835 was not complained of; perhaps, speaking by the card, it might not have been an untruth to say, that it does

¹ See ante, p. 316.

not appear by the order that it was complained of; that is a statement which might, in mere strictness of language, have been warranted. But it is not in any sense true to say that it appears by the order that it was not complained of. All that can be said is, that the order is silent about it, if you can treat it as being silent when it dismisses in terms the appeal, which did in fact include that decree as a subject matter of complaint. It appears to me, that it was a statement well calculated to mislead your Lordships. However, it was introduced into the petition of Tommey, and that petition was referred to the Appeal Committee to decide whether he should have leave to appeal against those several orders which had not been enrolled, and as to which he was not barred by the standing orders of the House, and also against the decree as to which he was barred, but which he thus alleged not to have been complained of or adjudicated upon. That * petition * 330 was successful, for on the 23d of May, 1848, leave was given to him by the Appeal Committee to appeal against the orders which had not been enrolled, and leave was also given to him, when he should have lodged his appeal against the unenrolled orders, to apply for leave to amend it, by including in it the enrolled decree.

Accordingly, pursuant to that leave, on the 27th of June, Tommey did present to the House a third appeal, complaining, not of the enrolled decree, but of the unenrolled orders. Having done that, and so obtained the *locus standi* for which the Appeal Committee had stipulated, as the condition on which he might apply for leave to extend his appeal, he did, on the 29th June, 1848, present a petition to the House, praying to be allowed to do so, by including in it the enrolled decree of January, 1835. That petition was heard before the Appeal Committee, and the leave so to amend his appeal was granted. He accordingly extended the appeal so as to include that decree, and the cause then being in the shape of an appeal against the decree of 1835, as well as against other subsequent proceedings, came on to be heard in 1850, and being so heard, relief was given to Tommey by reversing every thing which had before been done.

Mr. Tommey has had the misfortune of being a person in embarrassed, and indeed totally insolvent circumstances; so much so, that all these proceedings have been carried on by him *in forma pauperis*. Though the permission so to carry them on is

one which must be given for the furtherance of justice, it very often operates with cruel hardship upon the opposite parties, and so these gentlemen throughout these proceedings have found it; because I observe that, from the time of these proceedings in this

House, when this House refused to allow the original de-

*331 cree to be touched, in * the year 1839,¹ the parties who were opposed to Tommey, namely the trustees, have never

appeared at all. They have taken it for granted that your Lordships would adhere to the resolution to which you then came, and they have always avoided the expense of appearing. One sees the reason of that. They could not appear here without incurring a very grievous expense, and they relied upon the fact that they had the decree of January, 1835, in their favour, and that that decree stood untouched. The property had been sold under it, and your Lordships had refused to allow any appeal to be heard against it, therefore they left Mr. Tommey to take what course he might be advised to take. It is not pretended that notice was ever served upon the trustees, the original plaintiffs, of the order of the 23d of May, 1848, by which leave was granted to appeal to this House against the unenrolled decree, with liberty to apply afterwards to add the enrolled decree, or of the second order of the 2d of September, whereby leave was given to include that decree. The consequence was, that this was done in the absence of those gentlemen, they relying upon the former order. It does not appear whether they knew what had been done in the year 1847, when the appeal against the decree of 1835 had been dismissed; but certainly they knew of the original order by which the House had refused to allow any appeal against the decree of 1835. The original plaintiffs, relying upon that, took no pains on the subject, and the first thing which they heard as to the result of what had taken place in the year 1850 was this, that all which had been done from the beginning, every thing which had passed, had been,

behind their backs, reversed. Mr. Tommey had come

*332 here, and * had conducted the case as he had his other cases, altogether *ex parte*. For that I do not think he was to blame. I do not mean that he did not attempt to serve all that it was legally necessary to serve with notice; but such was the result, that in truth, behind the backs of the parties really and deeply interested in the litigation, all that had been done in it was

¹ 6 Clark & F. 786.

reversed. Under these circumstances, they presented the petition which is now under your Lordships' consideration, and which has been met by the counter petition of Mr. Tommey.

Those two petitions being before your Lordships, the course taken by the House was to give the parties leave to be heard upon the matter of the petitions, by one counsel on a side. The hearing has now taken place, and has received the full attention of this House. At the time of the hearing, there were present my noble and learned friend Lord Brougham, now not here, and also during a large portion of the argument, my noble and learned friend Lord Truro, who is compelled, through indisposition, to be absent; but from both those noble and learned Lords I have the fullest authority to say, that they entirely concur in the course I am about to recommend to your Lordships. Lord Brougham, without hesitation, because he heard the whole; and Lord Truro, with as little hesitation as that with which any person can speak who has not heard every thing that was said. He does not wish that any thing I now say should pledge him absolutely; because it is possible that he might have altered his opinion had not he been prevented by ill health from hearing the last hour or two of the argument. With that exception, the case has been fully heard and considered, both by Lord Brougham and himself.

Now comes the important question, — what ought your Lordships to do in this state of things? It was pressed very strongly on the part of Tommey by his counsel, that your Lordships in truth have no jurisdiction; that after a matter has once been heard and adjudicated upon in this ultimate Court of appeal, there is an end of it, that there must be an end somewhere, and that if it can be said that the trustees can be heard now to come and call in question the decree of 1850, what is to prevent Mr. Tommey coming afterwards, in 1860, and praying your Lordships to reconsider it again, and so *toties quoties* to the very end of time? That is, undoubtedly, an argument entitled to the greatest weight; but, unfortunately for Mr. Tommey, it appears to me to be an argument wholly inapplicable to his case, and which cannot lie in the mouth of one whose case has been twice adjudicated on against him before it was adjudicated on in the last instance in his favour, behind the backs of the other parties. I say adjudicated on. I know his argument was, that the merits were not gone into. Whose fault was that? It was adjudicated

*333

on in 1839, when this House held, on general principles, that it was not fit that he should be heard any more ; it was adjudicated upon, or, but for his own fault, might have been adjudicated upon, but I say clearly it was adjudicated on in 1847, when he brought an appeal before your Lordships ; an appeal supported by a case containing seven reasons for reversal, of which four related to the original decree, and three to the other matters. He was heard, with all the arguments he thought fit to put forward, and on that occasion the House came to the determination that that appeal ought to be dismissed. Does any argument, therefore, as to the finality of the decree, lie in the mouth of Mr. Tommey ? For the reasons I have stated, I think it does not. I think, at the same time, that that argument itself is one which ought to receive the very greatest attention. Several authorities were referred to, in

which it had been stated by Lord Eldon and other learned

*334 * Judges, that a case once decided here between A. and B.,

is, as against A. and B., conclusively and for ever decided, and that nothing but an Act of Parliament can afterwards alter the decision. I think that is so ; but then it appears to me that the matter was finally settled against Mr. Tommey either in 1839 or in 1847, and that brings me to observe upon the qualification which is introduced by Lord Eldon on this subject, which has a material bearing upon the present case. Although in any question decided by this House upon appeal the matter is finally settled between the litigant parties, it is always subject to this condition, that if one party has, by any misrepresentation, I will not put it so high as to say by fraud, for I do not wish to use harsh terms, but, if by misrepresentation, inadvertently (if you will) introduced, a party has led the House into an error, has led it to suppose that something is going on irregularly, all the commonest principles of justice compel this House, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting a fraud, or the machinery for effecting that which, if not done *per incuriam*, would have been a fraud.

Now that appears to me the principle which must govern your Lordships in the present case. Here is a case in which I must say I think no blame is attributable to the trustees. It could not be expected that they were to come here, year after year, at great, and as they had good reason to believe, at needless expense, litigating with a person who was conducting his case *in formâ pauperis*.

They supposed, upon the very principle which Mr. Tommey invokes, that your Lordships would adhere to your former decision, and they have not, therefore, stepped forward to defend it at your bar. It has happened that, behind their backs, a decree has been made reversing that which they * had a perfect right * 335 to consider finally and for ever settled. Now, what is the course your Lordships ought to take? I think the precise relief which is asked by these gentlemen is quite erroneous. They ask that the case may be reheard. That is not what I recommend your Lordships to do at all. But though they ask that, they ask also in a general way, what is sufficient for a case of this sort, "that your Lordships would grant to the petitioners such relief as to your Lordships in your great wisdom shall seem meet." What is the relief, then, which your Lordships in your wisdom ought to think fit to grant to these parties? Evidently to put them in precisely the same position as that in which they were before that erroneous order was made (behind their backs), giving leave to Tommey to present the appeal which has led to all the difficulty. That is the relief which I shall propose to your Lordships to grant. It may be true or not, that the decree of 1835 was altogether wrong; I have not sufficiently investigated it to give any thing like an opinion to your Lordships whether it was right or wrong. All I can say is, that it was the decree of an eminently learned and distinguished Lord Chancellor, who has since then again held the office of Lord Chancellor of Ireland, and lately that of Lord Chancellor of England, and was in substance acted on by Lord Plunket. The presumption, therefore, may be said to be strongly in its favour. Still, we are all liable to err, and, for the purpose of the present argument, I will assume that that decree was wrong. But that will not shake me from the position I take up, which is, that, right or wrong, there must be an end of a litigation at some time or other, and that that end had been arrived at here, if not, as I believe, in the year 1839, certainly in the year 1847, and that all that was done afterwards, as to bringing it again in question, was done in error and contrary to principle.

* What I propose, therefore, is that your Lordships shall * 336 discharge the order of the 23d of May, 1848, being the order allowing this last appeal; that of the 2d of September, 1848, being the order allowing the introduction of the enrolled decree, as a matter appealed against; and the order of the 2d of July,

1850, which was the order made upon hearing the appeal. I shall move your Lordships to discharge those orders, and to direct that the Court of Chancery in Ireland should deal with the case remitted back to it by the order of 1850, in such a way as may be just, having regard to the fact that the several orders aforesaid have been discharged.

Mr. Tommey. — Do your Lordships make any order in regard to the costs of this application ?

THE LORD CHANCELLOR. — There are no costs asked for on the other side.

Mr. Tommey. — They undertook to pay the costs.

THE LORD CHANCELLOR. — The House will give no costs.

The order afterwards made recited the petition and counter petition, and the hearing thereon, and proceeded thus : —

It is Ordered, by the Lords spiritual and temporal, in Parliament assembled, that the orders of the 23d of May and 2d of September, 1848, respectively, made by this House in the said cause, upon reports from the Appeal Committee, and also the said order of this House of the 2d of July, 1850, ordering and adjudging as therein mentioned, be, and the same are hereby discharged : and it is further ordered, that the said Court of Chancery in Ireland do deal with the said cause remitted back to the said Court by the last-mentioned order of the 2d of July, 1850, as may be just, having regard to the fact that the several orders aforesaid have been discharged by this House by this present order. — *Lords' Journals*, 5th April, 1853.

1853. May 6, 9.

THOMAS CARTER,	<i>Appellant.</i>
JOSIAH DIMMOCK, TIMOTHY DIMMOCK, and THOMAS KEELING,	<i>Respondents.</i>

In the matter of Thomas Carter, a Bankrupt.

Bankruptcy.

A person adjudicated a bankrupt under the 12 & 13 Vict. c. 106, must, if he desires to annul the adjudication, proceed under the 104th section of that statute. If he omits to do so, he can then only proceed by petition of appeal before a Vice-Chancellor.¹

¹ The jurisdiction, original and appellate, of a Vice-Chancellor in bankruptcy is now transferred to the Court of Appeal in chancery, and "all the provisions of

On the 15th of February, 1851, A. was adjudicated a bankrupt. On the 19th, a duplicate of the adjudication was served upon him, he did not appear to show cause against the adjudication, and on the 28th the notice of it was published in the Gazette. On the 19th of March he presented a petition to the Commissioner to annul the adjudication. The Commissioner pronounced his decision on the 14th of April, and on the 23d the bankrupt appealed to the Vice-Chancellor :—

Held (affirming a decision of Lord Chancellor Truro), that the petition of the 19th of March was a petition of appeal against the Commissioner's adjudication, and therefore could not be presented to the Commissioner, whose jurisdiction in such matters was then at an end ; that the party had no title to come before the Vice-Chancellor except on appeal against the adjudication, and that, for that purpose, the petition was presented too late.

THIS was an appeal against an order of Lord Chancellor Truro, sitting in Bankruptcy, by which a previous order of Vice-Chancellor Knight Bruce had been reversed. The matter, which depended on the construction to be given to sections 12, 104, and 233, of the 12 & 13 Vict. c. 106,¹ * had been brought before the *338

the former Act in relation to such appeal are to be construed accordingly." See 14 & 15 Vict. c. 83, § 7.

¹ 12 & 13 Vict. c. 106, § 12, enacts, "that the Court, in the exercise of its primary jurisdiction by virtue of this Act, shall have superintendence and control in all matters of bankruptcy, and shall hear, determine, and make order in any matter of bankruptcy whatever, so far as the assignees are concerned, relating to the disposition of the estate, effects, &c., save and except as may be by this Act specially provided, and subject in all cases to an appeal to such one of the Vice-Chancellors of the High Court of Chancery as the Lord Chancellor shall from time to time be pleased to appoint to sit in bankruptcy ; provided that if no such appeal shall be entered within twenty-one days from the date of any decision or order of the Commissioner, and be thereafter duly prosecuted, every such decision or order shall be final."

Sec. 104 enacts, that before notice of any adjudication shall be given in the London Gazette, a duplicate of such adjudication shall be served on the person adjudged bankrupt, "and such person shall be allowed seven days, or such extended time, not exceeding fourteen days in the whole, as the Court shall think fit, from the service of such duplicate, to show cause to the Court against the validity of such adjudication ; and if such person shall, within such time, show to the satisfaction of the Court that the petitioning creditor's debt, trading, and act of bankruptcy, upon which such adjudication has been grounded, or any or either of such matters, are [or is] insufficient to support such adjudication " ; and no other creditor's debt, trading, and act of bankruptcy, &c., sufficient to support such adjudication, shall be proved to the satisfaction of the Court, the Court shall thereupon order such adjudication to be annulled ; "but if, at the expiration of the said time, no cause shall have been shown to the satisfaction of the Court for the annulling of such adjudication, the Court shall forthwith, after the

Lord Chancellor, on a special case sent up from the Vice-Chancellor, which special case was in the following terms :—

*339 * Josiah Dimmock, Timothy Dimmock, and Thomas Keeling were plaintiffs in the Court of Exchequer in an action against Thomas Carter, and recovered a judgment against him for 65*l.* 7*s.* 9*d.*, which judgment was entered up on the 23d of July, 1850.

On the 26th of July, 1850, they issued a writ of *capias ad satisfaciendum* against Carter upon the said judgment, directed to the sheriff of the county of Stafford, upon which writ Carter was, on the 30th day of July, 1850, duly taken in execution by the said sheriff, and committed to the jail of the county, in which jail he thenceforth remained committed and confined under the said judgment and execution, up to and at the time of the filing a petition for adjudication of bankruptcy, and the said adjudication thereunder.

The petition for adjudication of bankruptcy bore date the 15th day of February, 1851, and was filed by J. and T. Dimmock and Thomas Keeling, as petitioning creditors, against the bankrupt, in the Court of Bankruptcy for the Birmingham district, on the same day. The debt which was the subject of the judgment alone constituted the petitioning creditor's debt. Under such petition the bankrupt was, on the said 15th of February, adjudged a bankrupt by one of the commissioners acting at the said Court.

*340 * On the 19th day of February, 1851, a duplicate of the adjudication was personally served on the bankrupt, and

expiration of such time, cause notice of such adjudication to be given in the London Gazette, and shall thereby appoint two public sittings of the Court for the bankrupt to surrender and conform, the last of which sittings shall be on a day not less than thirty days, and not exceeding sixty days, from such advertisement, and shall be the day limited for such surrender."

Sec. 233 enacts, "That if the bankrupt shall not, within twenty-one days after the advertisement of the bankruptcy in the London Gazette, have commenced an action, suit, or other proceeding, to dispute or annul the fiat, or the petition for the adjudication, and shall not have prosecuted the same with due diligence and with effect; the Gazette containing such advertisement shall be conclusive evidence in all cases against such bankrupt, that such person so adjudged a bankrupt became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the Gazette to bear date."

on the same day the bankrupt was discharged from custody, and under such discharge was released from custody by the sheriff.

The bankrupt did not, within the time allowed under the 104th section of the 12 & 13 Vict. c. 106, show cause to the Court against the validity of the adjudication, and the Court caused notice of the adjudication to be inserted in the London Gazette of Friday, the 28th day of February, 1851.

The first public sitting in the bankruptcy was held on the 10th day of March, 1851, on which day the bankrupt surrendered.

On the 19th day of March, 1851, the bankrupt presented his petition to the Court of Bankruptcy for the Birmingham district, and to John Balguy, Esquire, a Commissioner acting in the prosecution of petitions for adjudication of bankruptcy at the said Court, praying that the said petition for adjudication of bankruptcy, or the said adjudication thereunder, might be annulled.

The said petition was heard on the 14th day of April, 1851, and on that day the Court ordered that the petition of the bankrupt should be dismissed.

On the 23d day of April, 1851, the bankrupt presented his petition of appeal to his Honour Sir James Lewis Knight Bruce, the Vice-Chancellor appointed and sitting in bankruptcy, praying that his Honour would be pleased to direct that the order of the Court of Bankruptcy for the Birmingham district, dismissing the bankrupt's petition, might be set aside, with costs, and that the petition for adjudication, or that the adjudication itself, might be annulled, or that his Honour would be pleased to make * such other order in the premises as to him should seem fit. * 341

This petition was heard on the 10th day of May, 1851. At the hearing it was contended, on behalf of the petitioning creditors, first, that as the bankrupt did not, within the time allowed under the 104th section of the 12 & 13 Vict. c. 106, show cause to the Court against the validity of the adjudication, his petition to annul the adjudication ought to have been presented to the Vice-Chancellor, and not to the Commissioner; and secondly, that as the petition to the Vice-Chancellor was not presented, either within twenty-one days from the date of the order of adjudication, or within twenty-one days after the notice of the adjudication had been inserted in the London Gazette, such last-mentioned petition

was presented too late, and therefore ought to be dismissed ; but the Vice-Chancellor ordered that the adjudication of bankruptcy made against Carter on the 15th day of February, 1851, should be annulled ; and the same was thereby annulled accordingly. And it was ordered that the respondents, the petitioning creditors, should pay to the said petitioner his costs of and occasioned by that application ; and it was referred to an officer of the Court to tax such costs between the parties, if they differed about the same.

This special case was heard before Lord Chancellor Truro, on the 5th and 12th days of December, 1851, when his Lordship made the order now appealed against, reversing the order of his Honour Vice-Chancellor Knight Bruce.

Mr. Daniel and Mr. Motteram for the appellant. — The statute here has been too strictly construed. A person adjudicated * 342 to be a bankrupt is not deprived of all * right to seek to annul the adjudication, merely because he does not come before the Commissioner within seven days after that adjudication has been pronounced. It is clear that under the 12th section, the Commissioner has original jurisdiction in “all matters of bankruptcy” ; and the 230th section expressly empowers him to annul an adjudication, not only after seven days, but, certain conditions having been previously fulfilled, “at any time after the bankrupt shall have passed his last examination.” That section shows that the adjudication, as it is called, is not, properly speaking, a judicial act which must be the subject of appeal, but is a ministerial declaration, which may, under certain circumstances, be recalled by the authority that made it. If so, then a petition to the Commissioner to annul the petition for that adjudication was in this case addressed to the proper tribunal.

The next question is, whether that petition was presented in due time. It was so, if the petitioner was not compelled to proceed under the 104th section. He is not compelled so to proceed, otherwise he would lose the benefit of the 233d section of the statute. That section allows him to commence “an action, suit, or other proceeding, to dispute or annul the fiat, or the petition for adjudication,” within “twenty-one days after the advertisement of the bankruptcy in the London Gazette.” It is true that in *Ex parte Thorold*,¹ Vice-Chancellor Knight Bruce held that the

¹ 3 Mont. D. & De G. 285.

"other proceeding" there spoken of must be an action at law, or a suit in equity; but on appeal to Lord Chancellor Lyndhurst,¹ that decision was reversed, and a petition to the Court of Review was held to be comprehended within those words. That decision proceeded on the 5 & 6 Vict. c. 122; but it is applicable to the present case, for the *words of that statute *343 have been exactly copied into the 233d section of the 12 & 13 Vict. c. 106. In this case the petitioner did not proceed under the 104th section, for he did not merely seek to "show cause against the validity of the adjudication," but "to annul the fiat or the petition for adjudication," and therefore took his proceedings under the 233d section, which allows him "twenty-one days after the advertisement in the Gazette"; and as the 233d section does not restrict the petitioner to any particular tribunal, it is clear that he might present his petition to the Commissioner for that purpose. To hold the contrary would be to disregard the 12th section, and to render the 233d section utterly useless. A petition may be presented by a creditor to the Commissioner to annul an adjudication, on the ground of there being no act of bankruptcy, and such petition is not an appeal within the latter part of the 12th section of the statute, but is a proceeding within the primary jurisdiction of the Commissioner, authorised by the earlier part of that section. It cannot, therefore, be said that this appellant was too late, for he did not proceed under the 104th section. He did not petition by way of appeal against the Commissioner's orders of adjudication, but presented an original petition to annul, under the 233d section; and that section gives him the right to bring an action or "other proceeding," to dispute or annul the fiat or the petition for adjudication. He had, for that purpose, twenty-one days after the publication in the Gazette, that is, till the 21st March, to present his application, which has been decided to come under the words "other proceeding." He did present it on the 19th of March, and therefore he was in time. This application must be understood as one capable of being made to the Commissioner, for otherwise the 233d section must be entirely abrogated; and if capable of being made by him, it was made in time.

* Mr. Swanston and Mr. Wellington Cooper for the respon- * 344

¹ 3 Mont. D. & De G. 292.

dent.—The ground of objection to the validity of the commission was the want of a good petitioning creditor's debt. That was plainly an objection which the Legislature desired that the Commissioner should in the first instance decide. For that purpose the bankrupt was to come before him within a certain time after notice, and was merely to have an appeal, against his decision, to the Vice-Chancellor. Such are the provisions of the 104th section. The words in the 12th section do not extend the powers possessed by the Commissioner under the previous statutes, but rather restrict them, and provide a remedy by way of appeal to a Vice-Chancellor against the Commissioner's decision. The sections from the 89th to the 101st inclusive show that all the early stages of the proceedings are confined to the Court of the Commissioner. The 233d section has no reference to those matters, but declares the conclusive effect of the advertisement, if not brought into dispute within a limited time. It gives the bankrupt a right, within such limited time, to take proceedings to review what has been done, and to annul it. That cannot be by application to the Commissioner, who has already twice considered and decided the point; it must be to another tribunal. That other tribunal must be a tribunal of appeal, and the proceeding must be taken under the 12th section of the statute. That section requires it to be taken within twenty-one days "from the decision or order of the Court" appealed against. Here there was no petition of appeal to the Vice-Chancellor within that time; for, whether the time is calculated from the adjudication or from the publication in the Gazette, more than twenty-one days had elapsed before the petition to the Vice-Chancellor was presented.

* 345 * The case of *Ex parte Thorold*¹ does not bear the construction sought to be put upon it by the other side. It does not show that the bankrupt may disregard the 104th section, may pass by the seven days after receiving the notice of adjudication, and yet have twenty-one days after the date of the advertisement, in order to proceed to contest the bankruptcy. The 233d section cannot be read with it for that purpose. The bankrupt must proceed regularly; and if he allows the adjudication and notice to pass by without availing himself of the powers given by the 104th section, he can only afterwards proceed by way of appeal as directed under the 12th section. The adjudication, uncon-

¹ 3 Mont. D. & De G. 285, 292.

tested within seven days before the Commissioner, cannot afterwards be contested before him; and a petition subsequently presented to him gives him no jurisdiction, and consequently cannot entitle the petitioner to appeal against his decision upon it. His only remedy is by petition of appeal; and if so, then, treating the petition to the Vice-Chancellor as a petition of appeal against the adjudication itself, such petition is too late.

Mr. Daniel, in reply.—It is expressly established by the case of *In re Cheetham*,¹ that all the primary jurisdiction of the Court of Bankruptcy is transferred to the Commissioners; and *Ex parte Bean*, *In re Wilkinson*,² is to the same effect, and also shows that an application to the Commissioner to annul is not an appeal within the 12th section.

[THE LORD CHANCELLOR.—The question of the time within which the petition to annul must be presented to the Commissioner * did not arise in *Bean's Case*. The question * 346 there raised was as to the time within which the appeal must be presented against the Commissioner's decision.]

The contention on the other side is, that if the appellant proceeds under the 104th section, he must go to the Commissioner within seven days after adjudication, and that he is not after that time to go to the Commissioner at all; but that, if he proceeds under the 233d section, he cannot go to the Commissioner and afterwards to the Great Seal, but must go to the Great Seal at once. That is not so; and the 230th section shows that the jurisdiction of the Commissioner over the adjudication is not entirely at an end after the expiration of the seven days, but that, under certain circumstances, he may annul his own adjudication at the end of an indefinite period of time. That section furnishes a strong argument, by way of analogy, in favour of the bankrupt here.

THE LORD CHANCELLOR (LORD CRANWORTH).—My Lords, the point involved in this case is extremely simple. It appears to me, upon attending to the different sections of the Act of Parliament, that the judgment of Lord Chancellor Truro was quite correct, and therefore I shall advise your Lordships to affirm it.

¹ 21 Law J. N. S. Bank. 5.

² 1 De G. M. & G. 486, 21 Law J., N. S. Bank. 26.

The question arises under the Bankruptcy Consolidation Act, under which, for this purpose at least, I will assume that all primary jurisdiction in bankruptcy was given to that Court. The Commissioners of that Court have power to make all orders relating to the disposition of the estate, subject in all cases to an appeal to such of the Vice-Chancellors as the Lord Chancellor shall from time to time be pleased to appoint; and if no such appeal is entered, the Commissioners' decision or order is final.

The facts of this case are these. [His Lordship stated * 347 * them.] In order so to get rid of the effect of the advertisement in the Gazette, the bankrupt, on the 19th of March,

presented a petition to the Commissioner, praying him to annul the adjudication. The Commissioner, by an order of the 14th April, refused to interfere, and against that order, on the 23d of April, the petitioner presented his petition of appeal to Vice-Chancellor Knight Bruce, whose decision in his favour was reversed by Lord Truro, at that time Lord Chancellor. The question whether Lord Truro was right, must depend upon looking attentively at the very few enactments there are on this subject. I have already pointed your Lordships' attention to the 12th section, which gives original jurisdiction to the Court, subject to an appeal to any one of the Vice-Chancellors whom the Lord Chancellor shall appoint.

Section 104, upon which the matter mainly turns, has provisions to this effect. The proceedings in the first instance before the Commissioner, under which he adjudged the party a bankrupt, being *ex parte*, and the consequences of advertising his bankruptcy in the Gazette being probably likely to be very injurious to him, the Legislature took steps to secure to him a hearing before the Commissioner previously to such advertisement being inserted. The statute, therefore, provides that after the Commissioner has, upon *ex parte* evidence, found a man to be a bankrupt, notice shall be served upon him, in the mode pointed out in the section, that such adjudication has been made, informing him, that unless within seven days he appears before the Commissioners to show cause to the contrary, advertisements will be inserted in the Gazette announcing that he is a bankrupt. Within those seven days the party is at liberty to come before the Commissioner, who will hear whatever he has to say, and, having done so, determine aye or no whether he is a bankrupt. If the Commissioner * 348 * thinks the *ex parte* adjudication wrong, because the bank-

rupt has shown satisfactorily, either by adducing new facts or by explaining the facts heard in the bankrupt's absence, so as to establish that he ought not to have been adjudged a bankrupt, of course then there is an end of the matter; but if, on the contrary, the Commissioner thinks, upon hearing both sides, that the man is a bankrupt, then it is the Commissioner's duty forthwith to cause the advertisement to be inserted in the Gazette. The 233d section provides that, upon the advertisement appearing in the Gazette, if the bankrupt does not, within twenty-one days of that advertisement, commence an action, suit, or other proceeding, to dispute or annul the fiat or the petition for adjudication, that shall be conclusive against him.

Now what happened here was this. The bankrupt did not appear before the Commissioner to resist the adjudication within the seven days after the service of the notice; but, having let that time pass, he then, within twenty-one days after the advertisement, presented a petition to the Commissioner to annul the adjudication. The question is, whether that is or is not a proper proceeding? I am clearly of opinion that it is not such a proceeding as was contemplated by the statute; but that it is to all intents and purposes an appeal. It is very true, that in the particular case there had been no previous adjudication in the presence of the bankrupt. But why? Because he did not appear before the Commissioner. That was his fault. The jurisdiction given to the Commissioner on that subject is chalked out by the statute. He is to proceed *ex parte* in the first instance, to give notice to the party to be affected by such proceeding, and to proceed no further until that party has had an opportunity of coming in and being heard. If the party does not choose to avail himself of that opportunity, then, the Commissioner having done that which he was * bound to do, namely, adjudicated as if the party had * 349 been before him, that party cannot complain; he is not in truth before the Commissioner, because he chooses to abstain from coming; but the Commissioner's adjudication is then to be treated as an adjudication made in the presence of the party.

That being so, this petition is presented, and the allegation is, that it is not a petition of appeal, but a petition to annul the former adjudication. My Lords, that is really trifling with words. If the alleged bankrupt had appeared, and contended before the Commissioner that which he now contends, that he ought not to

be made a bankrupt, and the Commissioner had said, "I adhere to my former opinion"; and if he had afterwards presented a petition to annul that adjudication, does it signify whether you call it an appeal or call it a petition to annul. It is the same thing, it is an appeal. These statutes deal with it strictly as an appeal. I do not know that it is necessary that the word "appeal" should be used. In my opinion, it is not the meaning of the 12th section that there should be an appeal to the Commissioner against his own adjudication. When the Commissioner has adjudicated, he is *functus officio* as to the existence or non-existence of the order, and the party must come by way of appeal to the Vice-Chancellor, or, as now, to the Lords Justices.

That being so, it seems to me that the whole matter is decided; it being perfectly immaterial whether the party did or did not in fact appear before the Commissioner in the first instance: he had the opportunity of appearing; and that is sufficient.

The only difficulty I feel arises from the great respect that I entertain for the opinion of my late very learned coadjutor Lord

Justice Knight Bruce, who, it seems, thought that because * 350 the party had not in the particular * case in fact appeared to support his case, this was not to be considered as an appeal. I think, my Lords, that that would be a very dangerous doctrine indeed to admit, viz. that a party by making default, and not coming at the time when the Legislature says he ought to come, might reserve to himself the power to treat what had happened as if nothing had been done, and at the end of twenty-one days to take what may be called an original proceeding, to get that done which the Legislature meant should be done at the end of seven days.

I think that is a construction of the statute which would be pre-eminently inconvenient, and never could have been intended.

Two authorities were relied upon for the bankrupt: one was the case *Ex parte Thorold*,¹ before Lord Lyndhurst, which, I must observe, is no authority at all for what is here contended, because the decision was the other way, namely, that the petition was too late. It is true that Lord Lyndhurst drops expressions from which you may infer that he thought a petition would have been a "proceeding" (it is assumed that he meant an original proceeding) within the 233d section. With every possible deference to that

¹ 3 M. D. & De G. 285, 292.

very high authority, I think that very little weight can be attributed to an expression which, fairly interpreted with reference to the circumstances there existing, means no more than this, "I will assume this to be a proceeding within the 233d section, still, assuming it to be so, it will not avail you, for it is too late. To be in time, you must rely not upon that petition, but upon certain primary proceedings." That is what Lord Lyndhurst really decided, and it would be stretching the matter to a very great extent to infer that his Lordship meant to say *that he had * 351 considered that point, and was of opinion that that was an original proceeding within the meaning of the sections of the Act of Parliament to which we have been referred.

The other case relied on was that before the Lords Justices, — *Ex parte Bean, In re Wilkinson.*¹ It may possibly be that the Lords Justices were wrong there, but I conceive that they were perfectly right; but that that case will not support this appeal. What was there determined was, that, where there had been an adjudication affecting a third party, although he was not the person against whom the decision was directly pronounced, who was a stranger to the whole proceeding, who knew nothing of the adjudication, nor of the showing cause, but who was damnified by the order made by the Commissioner, that such third party, though the order might be valid as between the petitioning creditor and the bankrupt, might come to the Commissioner and say: "You have done me an injustice in a matter in which I have not had an opportunity of being heard. I call upon you, therefore, to annul that proceeding." That was the ground upon which the Lords Justices proceeded; they thought that the petitioner, being a stranger to the former proceeding, was not a party who could take steps under the 104th section, but a party coming originally to ask for an original relief, to which he was entitled, and that coming before the Lords Justices within a given time after the erroneous decision (as he contended it was) by the Commissioner, he was in proper time. That was the view taken by the Lords Justices, and consequently his petition was heard. That was the distinction upon which the Court proceeded in that case. Here there exists no distinction of that sort. This was an *attempt on * 352 the part of the bankrupt to open up the proceedings after the period pointed out by the statute, by an application which sub-

¹ 1 De G. M. & G. 486.

stantially is an appeal, first to the Commissioner, and then from the Commissioner to the Court of Chancery in Bankruptcy. Lord Truro was of opinion that, under the circumstances existing in this case, there was no jurisdiction at all in the Commissioner; and if so, the party had no title to come before the Court of Appellate Jurisdiction, except on appeal against the adjudication, and as to that, he came too late. In that opinion I concur, and I therefore recommend your Lordships to affirm the judgment of Lord Truro.

With respect to costs, the bankrupt is a prisoner, and therefore it is unnecessary to say any thing about him. The respondents will have their costs out of the bankrupt's estate.

An order was afterwards made that the order of the 12th December, 1851, be affirmed, and that the costs incurred by the respondents in respect of the appeal be paid out of the estate of the bankrupt.

Lords' Journals, 9th May, 1853.

1852. December 9, 10. 1853. April 28; June 3.

ANTHONY GIBSON, *Plaintiff in error.*

ROBERT SMALL and others, *Defendants in error.*

Insurance. Time Policy. Implied Warranty of Seaworthiness.

By the law of England, in a time policy effected on a vessel then at sea, there is no implied condition that the ship should be seaworthy on the day when the policy is intended to attach.

Per Lord Campbell.—There is not, in a time policy effected on a vessel then abroad, any implied condition whatever as to seaworthiness; not even as to the time when the vessel sailed on the voyage during which the policy attaches *Quare.* Whether there is any such implied condition in a time policy effected on an outward-bound ship lying in a British port where the owner resides.

A policy of insurance was effected in London on the 27th of November, 1843, on a ship then abroad, "lost or not lost, in port and at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the 25th September, 1843, and ending on the 24th September, 1844, both days included." To a declaration for a total loss on the

14th October, 1843, by perils of the sea, the defendant pleaded that "ship was not, at the time of the commencement of the risk in the policy of insurance mentioned, nor at the making of the said insurance, nor on the said 25th September, 1843, in the declaration mentioned, seaworthy, or in a fit and proper condition to go to sea; but, on the contrary thereof, was wholly unseaworthy." It appeared in evidence, that on the 24th of September, 1843, the ship was at sea, seriously damaged, and in that state it succeeded in making Madras in the course of the following day. The verdict found the plea to be proved in fact: Held (affirming the judgment of the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Queen's Bench), that this plea did not afford a defence to the action, for that there was no implied condition that the ship should be seaworthy on the day when the policy was intended to attach.

In this case an action had been brought in the Court of Queen's Bench by *Small and Others v. Gibson*, on a policy *of insurance effected on the 27th of November, 1843, by *354 them, as agents for Antonio Hypolite Gigual, on the ship "the Susan, lost or not lost, in port or at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the said 25th day of September, 1843, and ending on the 24th day of September, in the year 1844, both days included." Gibson pleaded four pleas, of which the second alone is material: "That the said ship or vessel, in the said declaration mentioned, was not, at the time of the commencement of the said risk in the said policy of assurance mentioned, nor at the making of the said insurance, nor on the said 25th day of September, in the year of our Lord 1843, in the said declaration mentioned, seaworthy, or in a fit and proper condition safely to go to sea; but, on the contrary, was wholly unseaworthy"; verification. Replication *de injuria*, and issue thereon.

At the trial of the cause at the London Sittings after Trinity Term, 1848, it appeared that, about the beginning of September, 1843, the ship sailed from Madras for the Mauritius, with 288 coolies on board; encountered very bad weather, and put into Trincomalee, which place the captain was ordered to quit or to go into quarantine, as the small-pox was reported to be on board his vessel. He preferred the former alternative, and determined to try to return to Madras, in order to get repaired. He encountered bad weather on the voyage, and the vessel became still more damaged, but he arrived at Madras on the 25th of September; so that on the day on which the risk was to attach, the vessel was at

sea, seriously injured, and endeavouring to make a port to get repaired. The necessary repairs could not be effected at Madras, and the captain therefore tried to reach Coringa, but met other misfortunes of a similar sort to those before experienced,

* 355 and was obliged * to put into Masulipatam. The coolies refused to stay on board any longer, the surveyors reported against the possibility of repairing the vessel, except at a very considerable expense, and finally it was sold, and the owners gave notice of abandonment.

The jury returned a verdict for the defendant, finding "that the said ship or vessel in the said declaration mentioned was not at the time of the commencement of the said risk in the said policy of insurance mentioned, nor at the making of the said insurance, nor on the said 25th day of September, 1843, in the declaration mentioned, seaworthy, or in a fit and proper condition safely to go to sea, but, on the contrary thereof, was at those times, and each of them respectively, wholly unseaworthy." A motion was afterwards made to enter judgment for the plaintiff, *non obstante veredicto*, but the rule was discharged and judgment given for the defendant.¹ A writ of error was then brought in the Exchequer Chamber, when the judgment of the Court of Queen's Bench was reversed, and judgment was given for the plaintiff *non obstante veredicto*.² The case was then brought by writ of error to this House.

The Judges were summoned, and Lord Chief Baron Pollock, Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Maule, Mr. Justice Erle, Mr. Baron Platt, Mr. Justice Williams, Mr. Justice Talfourd, and Mr. Baron Martin attended.

The Attorney-General (Sir F. Thesiger) and Mr. J. P. Wilde for the plaintiff in error.—The question here is whether, in a time policy as in a voyage policy, it is an implied condition that * 356 the vessel * insured is seaworthy at the commencement of the risk. There has not as yet been any express decision on the point; but the principles that must govern the case are clearly settled. Seaworthiness is a condition precedent to the validity of a policy. In Park on Insurance,³ it is said: "There is in the contract of insurance a tacit and implied agreement that

¹ 16 Q. B. 128.

² Ch. xi. p. 332, 7th ed.

³ 16 Q. B. 141.

every thing shall be in that state and condition in which it ought to be ; and therefore it is not sufficient for the insured to say that he did not know that the ship was not seaworthy, for he ought to know that she was so at the time he made the insurance. The ship is the substratum of the contract between the parties ; a ship not capable of performing the voyage is the same as if there were no ship at all ; and although the defect may not be known to the person insured, yet the very foundation of the contract being gone, the law is clearly in favour of the underwriter ; because such a defect is not the consequence of any external misfortune, or any unavoidable accident arising from the perils of the sea, or any other risk against which the underwriter engages to indemnify the person insured." Marshall on Insurance,¹ and Arnould on Insurance,² are to the same effect. This statement of the principle is justified by the authority of *Douglas v. Scougall*,³ *Annen v. Woodman*,⁴ *Wedderburn v. Bell*,⁵ *Christie v. Secretan*,⁶ *Lee v. Beach*,⁷ in the last of which cases the defect was latent ; but Lord Mansfield held the underwriter to be discharged by the mere fact of unseaworthiness, however innocent the owner was of knowing *and concealing that fact. This doctrine is * 357 not impeached by the case of *Mills v. Roebuck*.⁸ Lord Ellen-

¹ Bk. I. ch. v. § 1, p. 152, 3d ed.

⁴ 3 Taunt. 299.

² 1 Arnould on Mar. Ins. 653, 670.

⁵ 1 Camp. 1.

³ 4 Dow, 269.

⁶ 8 T. R. 192, per Lord Kenyon and Mr. Justice Lawrence.

⁷ Park on Ins. 7th ed. ch. xi. 342.

⁸ *Mills v. Roebuck*, in the Exchequer (Park on Insurance, 3d ed. 222, where it is said that judgment was given for the underwriters. But in Park on Insurance, 7th ed. 335, the judgment is stated to be for the assured. See also Marshall on Insurance, 154 and 156, note). This was an action on a policy of insurance, lost or not lost, at and from the Leeward Islands to London, on ship and goods in the "good ship or vessel called the Mills Frigate, beginning the adventure on the goods from the loading thereof on board the said ship at St. Kitts, and upon the ship from her arrival at the Leeward Islands." The ship was warranted to sail on or before the 26th of July, 1764. The loss was described in the declaration as having occurred through the "perils of the seas." There was a demurrer to the evidence. It appeared that the ship was French built, and that such ships were fastened with bolts of iron, which are liable to grow rusty, and when so, the timbers of such ships become loose at once, and the ships, without any perceptible symptoms of decay, are rendered incapable of bearing the sea. This occurred with this vessel, which was ordered, on the outward voyage, to touch at Madeira, but could not do so, and was obliged to bear away for Nevis, where it arrived on the 1st April, then went to St. Christopher's and delivered

*358 borough says, * in *Haywood v. Rodgers*,¹ "that if, on any account whatever, * the ship be not seaworthy at the com-

the outward cargo, and had such repairs done as were deemed necessary, and returned to Nevis, where, to satisfy freighters, the vessel was examined by all the captains in the harbour, who declared that, on being caulked, it would be strong and sound. It was caulked accordingly, and sailed, on the 26th of July, from Nevis, and within twenty-four hours, without any bad weather or extraordinary swell of the sea, became leaky, and was obliged to bear for St. Christopher's, where it arrived on the 28th of July, when the real cause of the mischief was discovered.

"The demurrer was argued in the Court of Exchequer, and judgment was there given in favour of the assured ; and of what fell from the Judges on that occasion, I have been only able to procure this account : 'That judgment was given for the plaintiffs, not upon the points argued (namely, that it was essential that the ship should be seaworthy), the Court being of opinion as to those with the underwriters ; but because the evidence did not, as the Court thought, precisely prove that the ship was not seaworthy at the time of the insurance taking place on the 1st of April, 1764,² on her arrival at Nevis ; but only that she was so at the time of her sailing on the 26th of July.' But the Court unequivocally declared, that a ship that is not, at the commencement of the insurance, in a fit condition to perform her voyage, is not a fit subject of insurance. The case was taken to the Exchequer Chamber, and was there affirmed, on the advice of Lord Mansfield and Lord Chief Justice Wilmot."

This case was afterwards referred to (5 Burr. 2804) in the case of March & Pigot (a bet, by two sons, on the lives of their fathers, one of whom happened to be dead, though unknown to the wagerers, at the moment the bet was made). when the counsel, referring to it, is reported to have said : "The case of the Mills Frigate was an insurance upon a ship which had a latent defect totally unknown to the parties ; and the insurers were holden not liable,³ upon account of the ship's being not seaworthy, though such defect was not known." On which Lord Mansfield immediately observed : "I differ totally in opinion from that doctrine. The determination in that case, which was made by my Lord Chief Justice Wilmot and me (to whom it was referred), was made quite upon another ground. And the change of opinion in the Court of Common Pleas happened upon the citing of two cases that had been determined before me ; which cases were mistaken. The insurer ought to know whether his ship was seaworthy or not at the time when she set out upon her voyage ; but how should he know the condition she might be in after she had been out a twelvemonth ?" The case in the Common Pleas in which the Court changed its opinion is thus referred to in Park on Ins. (7th ed.) 384 : "An action had been brought in the Court of

¹ 4 East, 590, 598.

² There is no statement but this in Park, nor any at all in Marshall, of the date at which the insurance was to take effect ; but it appears that the insurance was in fact effected on the 19th of June.

³ But see the statement that the judgment was for the assured. Park on Ins. 7th ed. 355, and Marshall on Ins. 154 - 156, n.

mencement of the risk, the underwriter is discharged from, or rather never incurred, any responsibility in respect to it." It is clear, therefore, that this requisite of seaworthiness, the bare absence of which nullifies the contract, must exist when that contract attaches, and consequently it must do so whether that contract is a voyage policy or a time policy. The Court of Exchequer Chamber was wrong in making a distinction between these two sorts of policies. Mr. Baron Parke, in delivering the judgment of the Court in this case, said:¹ "With respect to a policy on a voyage, there is not the least question but that there is an implied warranty of seaworthiness at the commencement of the risk." He therefore admitted the principle, but afterwards² said that there was no decision or sufficient authority which made it applicable to a time policy. The distinction thus raised is itself not warranted by principle or authority, either English or foreign, and, if admitted, might give rise to many frauds.

[LORD CAMPBELL.—Time policies are rare among continental nations.]

That is so. Then what are the English authorities? In *Hucks v. Thornton*,³ which was an action on a time policy, where the policy had a retrospective effect, and went back to a date long antecedent to that at which it was effected, one of the questions left to the jury by Lord Chief Justice Gibbs was as to the seaworthiness of the vessel; so that that learned Judge must have considered seaworthiness to be a condition to the validity of the policy. In *Hollingworth v. Brodrick*,⁴ which was also an action on a time policy, Mr. Justice Patteson, speaking on this subject, * said:⁵ "I do not know of any distinction on account of the risk being for time." In *Dixon v. Sadler*,⁶ also an action on a time policy, the loss was alleged to have arisen from the misconduct of the master; and Mr. Baron Parke⁷ speaks

Common Pleas, on the same policy, against one of the underwriters; and Lord Camden, who tried that cause, directed the jury to find a verdict for the plaintiff; but upon a motion for a new trial, his Lordship declared that he had changed his opinion, and the whole Court of Common Pleas laid down the principles above stated [this refers to the previously stated cases of *Carter v. Boehm*, 3 Burr. 1913, and *Eden v. Parkison*, 2 Doug. 732], and directed a new trial."

¹ 16 Q. B. 156.

⁶ 7 A. & E. 47.

² 16 Q. B. 159.

⁵ 5 M. & W. 405.

³ Holt, N. P. 30.

⁷ 5 M. & W. 415, 416.

⁴ 7 A. & E. 40.

of the obligation of the assured as to seaworthiness, and says that "it is not more extensive than in the case of an ordinary policy." This itself admitted that it was as extensive; and when that case was taken into the Exchequer Chamber,¹ Lord Chief Justice Tindal said: ² "No stress was laid, in the course of the argument before us, upon any distinction to be taken between the implied warranty on the part of the assured as to the seaworthiness of the ship in the case of a policy on a particular voyage, and of a time policy; nor do we think any such distinction can be held to exist: at all events, no distinction by which the obligation on the part of the assured, in the case of a time policy, can be held to be increased or extended." So that the Court there treated time and voyage policies as identical, with respect to the obligations of the assured. These are the notices to be found in the English writers, and decisions on this subject. The American authorities are to the same effect: and Chancellor Kent, in his Commentaries,³ "Every condition precedent requires a strict performance to entitle a party to his right of action"; and then, speaking of seaworthiness as a condition, he says: "The general rule is that the vessel must be 'seaworthy' at the commencement of the risk," whatever that risk may be, in order to make the policy attach and charge the insurer. In the judgment of Chief Justice

* 361 Shaw, in the * case of *Paddock v. The Franklin Insurance Company*,⁴ after noticing Lord Mansfield's observation in *March v. Pigot*⁵ as to a time policy, it is stated that "the general rule, that the ship must be seaworthy at the inception of the risk, in order to make the policy attach, and charge the underwriter with the risk, probably would be applied in this, as in all other cases, being a necessary incident to the contract." Valin declares⁶ that the question whether the loss is to be charged against the insurers or not, is to be determined by the other question whether, at the time of departure for the voyage, the ship was in a state to perform it; for if not, then the loss arose, not from the sea, but from the condition of the ship itself.

[LORD CAMPBELL.—According to your construction of this plea, to what point of time does it refer the question of seaworthiness?]

¹ 8 M. & W. 895.

² 8 M. & W. 898.

³ Pt. v. Lect. xlvi. p. 235, New York ed. of 1828.

⁴ 11 Pick. 227, 232.

⁵ 5 Burr. 2804.

⁶ Comm. sur l'Ord. de la Marine, liv. iii. tit. vi. art. 29.

To any point of time at which by intendment the verdict of the jury would render the vessel unseaworthy. After verdict, every intendment is to be made in favour of the pleading affirmed by the finding. The true dividing-point as to the duty of the assured with respect to seaworthiness, is taken in the judgment of the Court of Queen's Bench, where it is said,¹ "The warranty is fulfilled if the ship is seaworthy at the commencement of the risk." The Judges in the Exchequer Chamber left the question in a state of uncertainty, by reason of refusing to decide what is the particular nature of a condition of seaworthiness which attaches on a time policy, and confining themselves to negative the assertion that such a condition exists at the time of the commencement of the risk.² It is plain that there * may be a war- * 362 ranty given as to a thing over which a man has no power. A warranty of a horse will be valid, so that if the animal should die in consequence of a disease existing, though not known, when the warranty was given, the vendor could recover upon such warranty. It is so with a ship on a voyage policy, *Lee v. Beach*.³ The same principle applies to a time policy. The analogy between a time policy, and a voyage policy made in England on a ship "at and from" a foreign port, when it is impossible for the shipowner to know whether his vessel is seaworthy, is very strong. Now, in *Parmeter v. Cousins*,⁴ which was an insurance on the ship and freight, "at and from" St. Michael's to England, the ship arrived on the outward voyage at St. Michael's in a very disabled state, and after lying there for above twenty-four hours in great danger from the storm, it was blown out to sea and wrecked, and Lord Ellenborough held that the policy on the homeward voyage never attached. The argument that the ability of the assured to know the state of things, and to remedy any mischief to the vessel, is the test of the policy attaching, cannot be maintained while that case is recognised, nor while *Oliver v. Cowley*⁵ exists as an authority. There the assured was merely a shipper of goods, who could know nothing of the vessel, and had no power to put it into a state of repair; but Lord Mansfield held that "the implied warranty of seaworthiness could not be dispensed with in any case." This warranty is indeed a condition which attaches in all

¹ 16 Q. B. 140, 141.

⁴ 2 Camp. 235.

² 16 Q. B. 160.

⁵ Park on Ins. ch. xi. p. 343.

³ Park on Ins. ch. xi. p. 342.

cases, and if it affects a shipper of goods, a shipowner cannot be exempt from it. Suppose a vessel was not in existence at the time of the risk commencing, that would render the policy void, though

the fact was unknown to the parties. The words "lost or

*363 not lost" are often introduced into policies, and their meaning is, that parties who effect insurances on vessels at distant places do not know whether the vessel is in existence or not, and therefore agree that, supposing between the time when the risk insured against commences and the policy is made, the vessel has been lost, the policy shall still be good. But suppose

that no vessel exists at the time when that risk is to commence, there is no policy at all. In principle there cannot be any distinction between a vessel lost before the commencement of the risk, and a vessel being in a state which all authorities declare not to be the subject of insurance. The Exchequer Chamber, in a time policy, declared that it would be sufficient if the vessel was seaworthy, not at the moment when the policy attached, but at that at which the voyage commenced. That is applying a condition precedent *dehors* the consideration for the particular contract which was entered into between the parties. What can it signify in this case whether, at some distant period when the voyage commenced, and the ship was in a situation where repairs could be effected, that it was then in a seaworthy state, and that in a year afterwards, when the policy was entered into, this preliminary condition had ceased to be performed. The contract does not depend on the knowledge of either party, for both may be incapable of knowing the condition of the vessel ; nor does it depend on the question whether the ship was in a port where it could be repaired, but it does depend on the fact of the seaworthiness of the ship. Seaworthiness is a condition precedent to a vessel being the subject of insurance ; and unless that condition exists, no insurance is valid.

Sir F. Kelly and Mr. Serjeant Shee (Mr. Unthank was with them) for the defendants in error. — The real importance of *364 this case is in the extent to which * the Courts will impose on parties to written contracts, conditions which are not inserted in those contracts. There is clearly nothing which can be described as an authority for imposing on the assured in a time policy the condition that, at the moment at which that policy is to

attach, wherever the ship may be, and whatever may be the circumstances in which the ship is placed, it must be seaworthy, or the policy will be void. There is an expression of Mr. Justice Patteson in *Hollingworth v. Brodrick*,¹ which is supposed to declare that such is the rule; but if the words bear that meaning, it is clear that that was not the point argued in the case, and that the dictum was not required by the decision. *Sadler v. Dixon*² is certainly no authority for it; and when the expressions there of Lord Chief Justice Tindal are examined, they have rather an opposite tendency, for the latter part of the sentence plainly qualifies the former part. These are the only two cases which can be called authorities in favour of the plaintiff in error. The good faith of the assured, his ignorance of the state of facts, has nothing to do with this question. That matter relates to a totally different head of insurance law.

It may be admitted, that in a voyage policy it is an implied condition that the ship shall be in a fit state to undertake the voyage at the moment when that voyage commences; but the question here is, whether there exists such an implied condition in a time policy. The nature of the contract shows that there is no such implied condition. Here is a written contract, containing many stipulations; but none relating to the seaworthiness of the vessel. There is no reason of usage or of necessity why that should be superadded. The implied condition that the ship shall be seaworthy at the commencement of the voyage is no more than * that it shall be fit for what it undertakes; and * 365. that implied condition arises from a moral as well as a legal obligation, and is one which it is in the power of the assured to fulfil. Whether the vessel is in a port of the country where the policy is affected or in that of a distant country, it is in the owner's power, or in that of his agent, to see that, "at the time of sailing," it is in a condition to perform the voyage. He is, therefore, bound by the implied condition which arises out of his duty, and consequently he may lose the benefit of his policy even by the existence of a latent defect. If the port where the vessel is will not afford the means of repair, as in the case of the vessels at St. Michael's and Madeira, the general principle remains the same; but necessity creates an exception to its application.

The foreign writers give no warrant for the proposition now

¹ 7 A. & E. 40, 47.

² 5 M. & W. 405, 8 M. & W. 895.

contended for by the plaintiff in error. Valin, in his *Commentaries on the Ordinances of 1681*, says¹ that the right to recover on the policy depends on the question “si au depart, il était vraiment en état de faire le voyage ou non”; which plainly limits the question of seaworthiness to the commencement of the voyage.

[LORD CAMPBELL.—Do you contend that, with respect to a time policy, there is no condition or implication whatever with regard to seaworthiness?]

It will not in the least degree affect this argument to admit that the vessel must be in a seaworthy condition when the voyage is begun; it does not follow that it must be so if the date of such policy should attach when the ship is at sea.

[LORD CAMPBELL.—There are more policies on goods than on ships. The shipper of goods has no power over the vessel.
* 366 How do you reconcile his incapacity to recover * where the ship was not seaworthy at the commencement of the voyage, with the claim of the assured here?]

In such a case, if the owner of the goods is defeated in his action against his underwriter on the ground that the ship was not seaworthy at the commencement of the voyage, he has his remedy over against the owner of the ship for the breach of that implied condition; he is therefore protected against the consequences of the application of the rule in his case; but the ship-owner has no such protection. When the ship is and has been at sea for some time, it is impossible for the shipowner to know anything of its condition, and consequently he cannot be assumed to warrant it to be seaworthy. The insurer on goods, or on a time policy on ship, may possibly be taken to warrant the seaworthiness of the vessel when it left the port, but certainly not afterwards. There is no implied condition even in a voyage policy touching the condition of a vessel when out at sea, *March v. Pigot*,² and yet it is sought here to introduce such a condition into a time policy. There is no such thing as a warranty of seaworthiness except for a voyage. It is impossible to apply it to a time policy, for that is made when no certain voyage is determined upon, and the master cannot know what voyage he may have to make.

Mr. Wilde, in reply.—The warranty in a time policy and in a

¹ Vol. II. p. 81, liv. 3, tit. 6, art. 29.

² 5 Burr. 2804.

voyage policy may be assimilated. In the latter the vessel must be seaworthy at the commencement of the voyage for which it is insured; in the former it must be seaworthy at the commencement of the time for which it is insured. It is not because the owner of goods may recover from the owner of the ship, when the ship is unseaworthy, that the policy effected by the former is invalid; on the contrary, it is because the unseaworthiness of the ship has rendered the policy invalid, that the owner of * goods * 367 can recover against the owner of the ship, who has not fulfilled the implied condition of seaworthiness; and that further shows that knowledge of the fact of unseaworthiness, or the power to remedy it, has nothing to do with the question. It is admitted that the vessel must be seaworthy when it begins the voyage, and the same reason applies for holding that if the time policy is to attach in the midst of a voyage, the ship should then be in a seaworthy condition, at least for the then situation of the vessel. The underwriter is not bound to take on himself the wear and tear of the former part of the voyage. *Hucks v. Thornton*¹ is the only direct authority upon the point; but the other cases already cited show the principle on which this case must be decided. Arnould on Marine Insurance² contains cases which establish the fact that policies do sometimes contain admissions that the vessel then made the subject of insurance is in a seaworthy state at that moment, and which therefore show that without such admission the implied condition of seaworthiness does exist, and if that is not fulfilled the assured cannot recover.

THE LORD CHANCELLOR proposed the following questions to the Judges:—

1. Adverting to the record and proceedings in this case, is the policy subject to an implied condition or warranty that the ship was seaworthy?
2. If yea, then did the condition of seaworthiness mean that the ship was seaworthy at the time it commenced the voyage, or at the making of the insurance, or when the liability of the underwriters commenced, that is, on the 25th of September, 1843?
3. Are there any, and if any, what qualifications in * re- * 368

¹ Holt, N. P. 30.

² 660, 661, citing *Parfitt v. Thompson*, 13 M. & W. 392; *Phillips v. Nairne*, 16 Law J. N. S. C. P. 194, 4 C. B. 343.

gard to such seaworthiness in a case like this which would affect the rights of either party under the policy?

4. And, lastly, whether the plea is a valid plea in law in answer to the action?

LORD CHIEF BARON POLLOCK, on behalf of the Judges, requested time to answer these questions. The request was acceded to.

April 28.

MR. BARON MARTIN.—In answer to the first, second, and third questions, I am of opinion that the policy in question is not subject to any implied condition or warranty that the ship was seaworthy.

It is an established rule of law that a written contract (subject to certain known exceptions) shall be taken to contain and express the entire contract between the parties. The rule is well illustrated in the last edition of Starkie on Evidence;¹ and there is no doubt that, subject to the exceptions to which I have referred, a written instrument, whether it be appointed by law or by a compact of the parties to be the memorial of the contract, shall not be altered, or varied, or added to.

In the present case, the contract between the parties is a policy of insurance, and the alleged condition or warranty is, that the ship was at some period, at the commencement of the original voyage, or on the 25th September, 1843 (when the risk was to attach), or on the 27th November, 1843 (when the policy was made), in a particular state or condition expressed by the term "seaworthy," a term which has a known meaning, as well in regard to a ship in port as to a ship upon the commencement of a voyage, and about to be exposed to the perils of the seas.

The terms of your Lordships' questions import that no

* 369 * such condition or warranty is expressed in the policy itself; and there are not any words in it, except the words "good ship," from which such a warranty could possibly be implied. I am aware it has been said that these words authorise such an implication; but the learned counsel for the plaintiff in error did not so contend; and I think it clear that the word "good," as there used, is merely a description of the ship, and not a warrant of seaworthiness, which includes a proper supply of stores, the fitness and sufficiency of the master and crew, and several other matters to which the words "good ship" have no reference whatever; and I think it may be stated with certainty that if

¹ Part i. p. 648.

such a warranty arises by implication, it must be by an implication of law, or one of that character, and not from any words in the policy. This was the argument on behalf of the plaintiff in error at your Lordships' bar, and it was contended that the seaworthiness of the ship was by legal implication a condition precedent to the contract attaching, and that it must be taken as agreed between the parties, that the subject matter of the insurance was a seaworthy ship. There can be no doubt that such a case might fall within the exception as to written contracts before referred to, and that it might be alleged and proved as an addition to the written contract that such a warranty was understood and known to exist by all persons engaged in the business of underwriting. There is no such allegation or proof in the present case, which arises upon the question of a judgment *non obstante veredicto* (a proceeding substantially the same as a demurrer), on a plea in which no warranty is averred. I think, however, that if such an understanding or custom had been long notoriously prevalent, and had been adopted and acted upon in Courts of Law, your Lordships would take judicial notice of it without requiring any averment or proof in the particular case, and act upon and apply it in * precisely the same manner as a rule of law. This principle was laid down by the Court of Exchequer Chamber in *Barnett v. Brandao*;¹ and although judgment was reversed in this House,² the above principle was approved of. The question, therefore, really is, "Has the existence of such a condition or warranty been notoriously prevalent amongst persons engaged in the business of marine insurance?" and for the present purpose it must be shown that the Courts of Law have adopted and acted upon the principle of it.

It was not alleged on behalf of the plaintiff in error, that such a warranty had ever been held to be applicable to a time policy. On the contrary, it was stated that the present was the first instance in which its application to such a policy had directly arisen. But it was argued that the case of a time policy was in this respect precisely analogous to that of a voyage policy, and that, as the warranty undoubtedly does exist in regard to policies of the latter description, it ought to be held to exist in regard to policies of the former. A great many cases and authorities were cited to show that the warranty of seaworthiness existed in voyage

¹ 6 Man. & G. 630.

² *Brandao v. Barnett*, 12 Clark & F. 787.

policies. There is no doubt of the fact, and that for upwards of a century it has been adopted and acted upon by all the Courts at Westminster Hall ; and it seems most just and reasonable that it should be so. In voyage policies the owner knows, or has the means of knowing, the condition of his ship, the sufficiency of his stores, and the competency and fitness of the master and crew. It is his bounden legal duty towards the mariners for the safety of their lives, and towards the merchants who load their goods, "that the ship should be tight, staunch, and strong, and in every

*371 way fitted for the voyage," or, in other words, "seaworthy" ; *and it may most properly be implied that, in

his contract with the underwriter, the owner shall be taken to warrant, as the foundation of the contract, that the ship, the subject matter of the insurance, is or shall be at the time of sailing a seaworthy ship, and that the premium is to be calculated on the principle that the perils insured against are to be borne by a vessel prepared to resist, and, if possible, to overcome them ; and if the record in this case had shown that the policy had been effected upon the ship upon its setting out from the original port of sailing on the voyage or enterprise on which the loss occurred, I am of opinion, in analogy to the case of a voyage policy, that the warranty ought to be implied. But the record does not show that the policy was effected under any such circumstances ; and it is equally consistent with the facts therein stated, that the ship was a whaling ship, sent to the Southern Ocean, and intended to be absent for several years, or was a ship sent (as is now extremely common) to a distant quarter of the world, and intended to trade there for an unlimited time,— indeed, not to return to England unless forced by necessity so to do for repair, and that the policy was effected to protect the ship after a former one had expired.

Now, is there any analogy between this case and a voyage policy ? In my opinion there is not. In the first place, can it be reasonably supposed that either party thought of taking into consideration the condition of the ship at the time when it commenced the voyage or enterprise ? Upon the present supposition it had been for a period of time at sea, and was in existence as a ship at the time of the commencement of the risk ; otherwise the policy would not attach at all, and the premium would be recoverable back. It seems to me impossible to conclude with reason

that under such circumstances either party contemplated the condition of the ship at the time of its original * sailing, * 372 and that it would be improper to imply any warranty in regard to that time.

Secondly. Is the warranty to be implied as at the time of the making the policy ? In considering this point, I think it proper to state that, in my opinion, fraud or misrepresentation or concealment has nothing whatever to do with the question submitted by your Lordships. If the assured committed any of these things, the policy is void upon an entirely different principle. An assured is bound to communicate to the underwriter every material circumstance within his knowledge. Both parties must, therefore, in my opinion, for the purpose of this present question, be assumed to be in the same state of knowledge or ignorance as to the circumstances or condition of the ship ; and I am at a loss to perceive what ground or analogy there is for supposing that the assured takes upon himself the hazard of his ship being seaworthy at the time when he makes the contract of insurance. His very object in effecting the policy is to pay a sum of money or premium for the purpose of casting upon another the perils and chances of the voyage during the period insured. Indeed, such a warranty does not exist in some cases of a voyage policy ; and it would seem very unreasonable and inconsistent that an underwriter, who by the express terms of his contract is responsible in the event of the ship being totally lost between the 25th September, 1843 (when the policy attaches), and the 27th November (when it is in fact made), should not be responsible in the event of the ship having received partial damage in the intermediate period, and being unseaworthy at the termination of it.

The third case is, Does the warranty exist as regards the time when the risk was to attach ? In my opinion it does not. There is no such term in the policy. There is no usage or custom in respect of it, and in my opinion there is * no analogy * 373 between this case and that of a voyage policy ; and I think it would be unreasonable to imply it, as it seems to me to transpose the relation of the assured and underwriter, and to render the former an assurer to the latter instead of the latter to the former.

It was urged by the counsel for the plaintiff in error, that the insurer of goods was by law subject to the warranty of seaworthiness, and that he was equally ignorant of, and had as little control

over, the condition of the ship, as the owner who effected a time policy during a voyage. This is quite true, but I think capable of a very simple explanation. At the time when the warranty of seaworthiness was established, the insurer of goods (who was not the owner of the ship) almost universally loaded his goods on board a general ship. The shipowner in such a case was subject to a contract, implied by law, that the ship was "tight, staunch, and strong, and in every way fitted for the voyage," or, in other words, "seaworthy"; and in the event of damage occurring by reason of this contract not being complied with, the owner was responsible. The owner of goods proposing to insure would, in order to render the premium as low as possible, naturally represent that the goods were loaded on such a ship; and his situation, when insured, would be, that he was protected so far as regarded damage arising from unseaworthiness, by the contract of the owner, and as to damage arising from perils of the sea operating upon a seaworthy ship, by the contract of the underwriter, and this at the lowest possible cost.

It was also urged that the denial of the existence of the condition or warranty in question would open a wide door to fraud; and the instance was put of an owner effecting a time policy who had heard that his ship had sustained damage, and concealing his information from the underwriter. In such a case there

* 374 would be a clear defence to an * action on the policy, on the ground of concealment. But it was said that this defence was difficult to be proved. I certainly do not feel inclined to yield to the argument that because one defence is difficult of proof the Courts of Law should therefore admit another, the proof of which is alleged to be more easy. But in reality there is no weight in the point; for if the fraudulent owner insured his ship as from a day before the misfortune occurred, this defence of non-seaworthiness would fail, unless indeed the warranty is to be taken to exist as at the time of effecting the policy; for which position there is no authority or analogy whatever.

It was further urged that a decision against the plaintiff in error would be very unjust and hard upon underwriters. I do not myself at all concur in this view; but it is satisfactory to know that by the simple insertion in the policy of the words "warranted seaworthy," at any particular time, both parties will clearly know the nature of their contract upon this point.

The result of the investigation has satisfied me that there is no distinction between the warranty of seaworthiness in regard to voyage policies and time policies. Under the same circumstances the warranty is, in my opinion, identically the same. If a time policy be effected upon a ship about to sail from a given port on a voyage or enterprise, the ship must, in my opinion, be seaworthy at the time of sailing; otherwise the policy does not render the underwriter liable. But in the event of the time policy being effected upon a ship after it has begun the voyage, and to commence during the progress of it, such a case is, I think, entirely out of the operation of the rules of law in respect of the "warranty of seaworthiness," and is not affected by them; and if the ship exists as a ship at the time of the commencement of the risk, the underwriter is responsible, whether it is then seaworthy or not.

* Misrepresentation or concealment in respect of the * 375 ship's seaworthiness would render the policy void; but in the case of mutual and common ignorance, the underwriter is, in my judgment, that which the spirit of the contract requires him to be, the insurer, and the party who is to bear the hazard.

For these reasons I have to state, in answer to your Lordships' first, second, and third questions, that in my judgment the policy referred to is not subject to any implied condition or warranty of seaworthiness; and to the fourth, that the plea is not a valid plea in law in answer to the action.

MR. JUSTICE TALFOURD.—In answer to the first question proposed by your Lordships I have to submit my reply, that the policy to which it refers is not subject to an implied condition or warranty that the ship insured was seaworthy.

The grounds on which I have arrived at this conclusion are simple, and may be stated in a few words. The question applies to an instrument in writing, which must be assumed to express all the terms which the parties desire to embody in their contract, unless there shall be found to exist some condition or warranty so clearly established by mercantile usage as to have become part of mercantile law, and to be understood when the contract is silent. The obligation of establishing that such a usage has produced such an implication lies on the party asserting it; and the question is whether, in this case, the defendant below has succeeded in estab-

lishing that an implication of seaworthiness exists in the case of a time policy.

Now, it is conceded on the one hand, that in the case of a voyage policy such an implication exists ; it is conceded on the

other hand, that if established in the case of a time policy,

* 376 * it must be by the application of the principle, thus recog-

nised, to time policies, as being in their nature subject substantially to the same considerations, and requiring the same rules as policies on voyages. In the able arguments which have been addressed to your Lordships on this subject, it has been admitted that, although some dicta of Judges and some expositions of Jurists may be cited in favour of the theory of those who maintain the application of the implied condition of seaworthiness to time policies, no decision of an English Court has ever been pronounced affirming it. Unless, therefore, its supporters can establish an analogy so nearly perfect between the two cases as shall render the rule of mercantile law, which is confessedly applicable to the one class of policies, applicable also to the other, they must fail in the attempt to engrast on a written contract a condition or a warranty which it does not express.

If it was clear that the implied condition, in case of voyage policies, of seaworthiness existing at the commencement of the voyage, is founded on a principle that the subject matter of every marine insurance must, in order to the contract's attaching, be fit for the endurance of the contemplated perils, it might follow that such a condition would equally apply where the contract is one of insurance from one point of time to another point of time, regardless of the employment of the vessel. But it will be found, on examination of all the text-writers, that the doctrine is generally based on the more limited consideration of the power of the owner to render his vessel seaworthy at the commencement of the adventure insured, and on the means of knowledge fairly attributable to him at the time of the contract ; and that hence, from the circumstances existing in a great majority of cases, a general rule has been deduced applicable to all. It is true that the rule, thus based, being once established, is not in its application confined to such cases as * those which led to its adoption ; but that, being once adopted, it is applicable to the entire class, whether the instance may be similar to the mass of cases which created the rule, or to mere exceptions which must always

have existed. It is, therefore, a fallacy to contend that a recognition of this knowledge or power of the owner as the basis of the rule prevents its application to cases where the ordinary incidents may not occur, and thus render it wavering or uncertain. It is one question whether, in the case of a voyage policy, the owner may insist on the circumstances of his particular case as an exemption from the condition of seaworthiness by reason of his want of knowledge or means of knowledge of the state of his ship at the time of the commencement of his risk ; and another whether the condition shall be implied in a different class of insurances to which it has never been judicially applied, and in which the rule and the exception change places. There are, no doubt, cases of voyage policies in which the owner may be destitute of the means of ascertaining the state of his vessel, and cases of time policies in which he may possess such means ; but the rule is founded on considerations of convenience applicable to the numbers of instances in the one case which do not exist on the other ; it must be applied to the class which created the rule, and must not be varied to suit the exception. The very interpretation of the term "seaworthiness" in the voyage policies suggests a material distinction between the two classes ; for it is not a word of absolute but relative meaning, since it is modified according to the nature of the voyage contemplated by the policy. How can the term be applied in this, its flexible sense, to policies for time, — policies independent of a voyage contemplated, begun, or to be renewed, which in its terms may embrace a portion only of one voyage, or portions of two voyages, or may include several voyages ?

* For these reasons, in the absence of any binding authority, I answer your Lordships' first question in the negative ; and so answering it, I involve the determination of the second and third questions, which assume that, in some sense, a condition of seaworthiness is implied in a time policy. If such condition exists, it would seem to be very difficult to qualify it, or vary its application ; and the obvious difficulty of the task would seem to prove that the condition is equally applicable in all cases of the class, or does not exist in any. The importance, indeed, of the determination of the main question to future maritime adventure is not so much whether the implication shall be sustained or defeated, as that the rule adopted shall be general and certain. Let it be decided that there is, in the case of any time policy, an

implied condition that the vessel shall be seaworthy at some time, though it is always very difficult intelligibly to state at what time, and the parties may, at their discretion, exclude it or qualify it by express words. Let it be decided that no such condition is implied, and they may introduce it, either by way of condition or warranty, in reference to such time or occasion as they select, and guarded or qualified according to their wishes. But the most inconvenient result would be that the law should make a condition for them, and yet leave it open to the evils attendant on an elastic and therefore an uncertain rule.

It follows from the answer I have submitted to the first question, that the plea, being applied to a condition which is not expressed in the contract declared on, nor implied by law, is not a valid answer to the action ; and, therefore, my answer to the fourth question is in the negative.

MR. JUSTICE WILLIAMS.— In answering the four questions which your Lordships * have proposed for the opinions of the Judges, I shall take leave to begin with the fourth, because by so doing I shall be able more conveniently and more briefly to explain the principle which I think ought to govern the answers to them all.

On the fourth question, then, I am of opinion that the plea is a valid plea in law in answer to the action.

Its effect, as I understand it, is to set up as a defence the fact that the ship was not seaworthy at the time of the commencement of the risk of the underwriters, or, in other words, at the commencement of the portion of time for which the insurance was effected. The record does not disclose under what circumstances, whether in port, or on a voyage, the ship lay at that point of time; and therefore, unless there is an implied condition in policies of this nature, that the ship shall, under all circumstances whatever, be seaworthy at the commencement of the risk of the underwriters, the plea cannot be supported. But I am of opinion that there is such an implied condition.

I have not been led to this conclusion on the supposition that there is any decision or authority applicable expressly to this point; but because it appears to me that the question is in truth governed by a general rule of our law, that in every policy of marine assurance there is an implied condition that the ship

shall be seaworthy at the commencement of the risk of the underwriters.

The contention on the part of the assured has been, that this rule is based on the supposition that in ordinary cases of a voyage policy it is competent to the shipowner or his agents to put the ship into a seaworthy state at the period of the commencement of the risk ; and that the rule ought not, therefore, to extend to time policies, inasmuch as it cannot in such cases be presumed generally that the assured * knows the condition of the ship * 380 at the commencement of the term, or has the power to secure its being then seaworthy. But, in my opinion, the rule is founded simply on the doctrine, that the object and intention of a policy of marine assurance is, that the owner of a ship which is seaworthy shall be indemnified against certain perils ; and if this is the foundation of the rule, I can discover no reason why it should not be applied to a policy for a specified time, as well as to a policy for a specified voyage.

It may be, that, in the application of the rule, the degree of requisite seaworthiness may vary in the case of a time policy from that in a voyage policy. But that question does not arise on this record. For it must be presumed, after verdict, that at the trial the Judge properly directed the jury, and that under that direction the jury properly found that the due degree of seaworthiness did not exist at the commencement of the risk.

This being my opinion with respect to the fourth of your Lordships' questions, it is but matter of form that I should answer the first and second of them by saying, that I am of opinion that the policy is subject to an implied condition of seaworthiness ; such condition meaning that the ship was seaworthy when the liability of the underwriters commenced.

And that as to the third (adverting to the record and proceedings), I am not aware of any qualifications in regard to such seaworthiness in a case like this, which would affect the rights of either party to the policy.

MR. BARON PLATT, after stating the facts and the pleadings, said : Seaworthiness is a relative term, and when applied to a voyage policy has a subject to which it may distinctly refer. Every vessel at the commencement of each particular * voy- * 381 age requires appliances commensurate and appropriate to

the ordinary risks of navigation during the particular voyage contemplated. Its state, as to repairs, equipment, and crew, and in all other respects, should, at the time of its sailing on the voyage insured, be fit to encounter the ordinary perils of that particular voyage ; and there is no difficulty in fixing the commencement of the risk as the time at which the implied condition or warrant of seaworthiness is to attach. Such, however, is not the case with a time policy. In that case, what degree of seaworthiness should exist at the commencement of the risk ? To what use of the vessel should it relate ? The vessel may be within a few days of concluding her homeward voyage from Holland, and may be about to proceed on a voyage to Honduras. The Honduras voyage may not have been determined upon at the time of effecting the policy. What, in such a case, is to be the measure or test of the seaworthiness to be required to exist at the commencement of the risk ?

It is a mistake to suppose that, before the decision of the Court of Queen's Bench in this case, any of the Courts of Westminster Hall had determined that in effecting a time policy, the assured warranted the ship to have been seaworthy at the commencement of the risk. In *Hollingworth v. Brodrick*,¹ the Court of Queen's Bench had not so determined ; nor had the Court of Exchequer or the Court of Exchequer Chamber, in *Sadler v. Dixon*,² so determined. In *Hollingworth v. Brodrick*, Sir John Patteson is reported to have said : "It is clear that the implied warranty is satisfied if the ship is seaworthy at the commencement of the risk.

I do not know of any distinction on account of the risk being for time." He, *however, thus concludes his judgment : "But I wish to go upon the broad ground, that no warranty of seaworthiness is to be implied except at the commencement of the voyage."

In *Dixon v. Sadler*, my brother Parke, in delivering the judgment of the Court of Exchequer, distinctly says, that there were not any cases in which the obligation of the assured, in the case of a time policy, as to the seaworthiness or navigation of the vessel, was settled ; but that it might be safely laid down that it was not more extensive than an ordinary policy. To hold that the assured, in a time policy, warrants the vessel to be seaworthy at the commencement of the risk, would operate most inconveniently

¹ 7 A. & E. 40.

² 5 M. & W. 405, 8 M. & W. 895.

and mischievously on commercial enterprise, and deprive the ship-owner and merchant of the possibility of completely protecting themselves by insurance from loss by perils of the sea.

My brother Parke, in delivering the judgment in this case in the Court of Exchequer Chamber, pointed out some of the inconveniences that would follow the adoption of the doctrine now contended for.

With regard, therefore, to the question first proposed by your Lordships, seeing how utterly contraventive of the very object of marine insurance the doctrine contended for by the defendant is, I think that, unless the implied condition or warranty is of the description suggested at the close of the judgment of the Court of Exchequer Chamber, the policy in the pleadings mentioned was not subject to any implied condition or warranty that the ship was seaworthy.

If it was subject to any such condition or warranty, my answer to the question proposed by your Lordships is, that it was to a condition or warranty of seaworthiness at the inception of any voyage concluded or begun during the * term, and in which, * 383 during the term, the loss assured against might happen.

Such a condition or warranty is intelligible; its observance is practicable, and would be calculated to extend to the assured and to the underwriter respectively every reasonable protection.

My answer to the question thirdly proposed by your Lordships is, that I am not aware of any qualification in regard to such seaworthiness, in a case like this, which would affect the rights of either party.

As, for the reasons I have assigned, I think the implied condition or warranty, if any, cannot attach at the commencement of the risk; and as, by the terms of the contract, if the vessel had been lost at the time of making the insurance, that loss would not have vacated the policy; I answer to the question lastly proposed by your Lordships, that in my judgment the plea is not a valid plea in law in answer to the action.

MR. JUSTICE ERLE.—My answer to the first question of your Lordships is in the affirmative, that the policy was subject to a condition that the ship was seaworthy. It appears to me that this condition is involved in all contracts of marine insurance, it being necessarily the basis of the calculation on which the insurer relies

in fixing the amount of the premium he is to receive. That amount depends on the degree of risk ; in other words, on the chance of the ship encountering the perils insured against with safety ; and unless it is given, that the ship is in some degree fit to meet those perils, the loss is certain.

As the word "ship," in common use, may denote either a mere frame, or a ship with its apparatus ready for sea ; so, in * 384 marine policies, it may be construed to express either * the mere structure of timber, or all that must be combined therewith to make it fit to perform service as a ship ; and its meaning in different policies may be made to vary according to the different nature of the services required of the ships insured thereby ; and the contract, so construed, contains the condition that the ship insured has the degree of fitness for the service it is engaged in, which is expressed by seaworthiness ; it being now settled that the term "seaworthy," when used in reference to marine insurance, does not describe absolutely any of the states which a ship may pass through, from the repairs of the hull in a dock till it has reached the end of its voyage, but expresses a relation between the state of the ship and the perils it has to meet in the situation it is in ; so that a ship, before setting out on a voyage, is seaworthy, if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage. I have not found a definition of the word, but I gather its meaning, as above explained, from the decisions turning upon it. According to this view, the condition is derived from the construction of the words of the instrument. But whether it is said to be derived from this source, or from implication of law, founded on the nature of the contract, I am of opinion that time policies are subject to it as well as voyage policies. If the question turns on the construction of the instrument, time policies may be taken to be identical with voyage policies in all the terms, except those relating to the measure of the duration of the insurance. This, in voyage policies, is measured by the motion of the ship ; in time policies, by the motion of the earth. Each contract is for an indemnity, and each for a limited time ; and there seems no reason for holding that an alteration in * the terms relating to the time should alter the effect of terms relating to the indemnity.

The case may be supposed of a ship about to sail from London to China, and one part owner may insure by a voyage policy and another by a time policy, both policies being in all other respects the same ; and the ship may arrive at the end of the time insured, in which case the time covered by both would be the same. But if the ship should be lost within that time, and should have been unseaworthy at the commencement of its voyage, it seems unreasonable so to construe the two contracts that the same words under the same circumstances should produce opposite results, and throw the loss on the insurer in the time policy and on the owner in the voyage policy. And yet this seeming absurdity would be the law if voyage policies are subject to the condition in question and time policies are not.

Also, if a time policy is construed to be without any condition of seaworthiness, the liability of the insurer may be increased beyond the terms of his contract ; for, in the case of a ship insured from the 25th of September, if on the 24th it was so damaged by a storm that it sank on the 26th from a peril which would have been harmless but for the prior damage, here the loss originates from a peril not included in the insurance ; but if the insurance applies to an unseaworthy ship, the insurer is made liable beyond his contract. If the question turns on an implication of law arising from the nature of the contract, all the reasons for making the implication in voyage policies are of equal force for making it in time policies. It is equally essential as the basis of the calculation on which the insurer fixes the amount of premium, and equally essential to prevent fraudulent owners from insuring a ship for the purpose of its being lost.

* All authorities justify this view. The only judicial determinations on the question are those now appealed from. The Judges in the Queen's Bench were unanimous for the affirmative answer to the present question, and the Judges in the Exchequer Chamber, in overruling that judgment, express their opinion to the same effect in the following passage : " We are far from saying that there is no warranty of seaworthiness at all in a time policy. So to hold would be to let in the mischief which the law provides against in a voyage policy ; or that there is not the same warranty in the case of a time policy as in a voyage policy, according to the situation in which the ship may be at the time of the insurance." The other authorities are declarations

indicating an opinion that time policies are subject to a condition of seaworthiness; and I refer to what was said by Chief Justice Gibbs in *Hucks v. Thornton*,¹ Chief Justice Tindal in *Sadler v. Dixon*,² and Justice Patteson in *Hollingworth v. Brodrick*,³ and to the passages in Arnould,⁴ and Phillips,⁵ being the authorities cited at the bar. They may not be decisive for the affirmative; but they are decisive to establish that no Court, or Judge, or author, hitherto has intimated an opinion that there is no condition of seaworthiness in time policies.

The reason assigned for now deciding that time policies should be exempt from any condition of seaworthiness is, that there is a class of owners who wish to insure ships for a time, and who by reason of the absence of the ships have no means of knowing whether their ships are then seaworthy; and because this class of owners is without the requisite knowledge, therefore all persons

*387 choosing to insure for a time ought to be exempt from the condition which * has been hitherto the basis of the contract of the insurer.

This reason appears to be unsatisfactory on many grounds: First, considering the present facilities for communicating with all parts of the globe, the owners who wish to insure ships which have been long unheard of and are in an unknown place cannot be so numerous as to make it expedient to unsettle the principle of insurance for the purpose of gratifying such a wish; 2dly, the owners so situated, if they choose to insure from the date of the last advice that the ship was seaworthy, have the same means of knowledge, and therefore ought to be subject to the same condition as the owner who insures the homeward voyage upon information received from his agents abroad; and if they choose to insure from a later day they ought to take the risk of the interval; and, 3dly, owners wishing to insure by a time policy, to begin from a time long after the last notice that the ship was seaworthy, may by an additional premium stipulate that the ship should be admitted to be seaworthy. These are the grounds I have to submit for answering in the affirmative to the first question.

My answer to your Lordships' second question is, that the condition of seaworthiness applied to the 25th of September. The

¹ Holt, N. P. 30.

⁴ Sections 248, 249, p. 670.

² 8 M. & W. 895.

⁵ Ins. Vol. I. p. 328.

³ 7 A. & E. 40.

contract of insurance commences at that time, and the condition is contained in or implied from the contract for the purpose of enabling the insurer to calculate the risk of a seaworthy ship from that time to the end of the insurance; seaworthiness at any other time appears to me irrelevant. I am not aware of any qualification material to the rights of the parties, if seaworthiness has the meaning above attributed to it. It may not be superfluous to add that, according to that meaning, in case of an insurance beginning in the course of a voyage, a ship which was seaworthy at the commencement of it would still be seaworthy, notwithstanding any loss by the ordinary * accidents of a voyage, if the risk * 388 of reaching the port of destination in safety was not materially increased by reason of such loss. But if the ship was dangerously damaged before the commencement of the insurance, the condition would apply, and the policy would not attach.

I think the plea valid. If all time policies are subject to a condition, it is conceded to be good; if no time policies are so subject, it is conceded to be bad. But if the law as to time policies is as was supposed in the judgment of the Court below, and seaworthiness is understood as there explained, it is clear that all time policies are subject to some condition of seaworthiness. It is there supposed, that in case of policies commencing when ships are on their voyage, the condition is, that they were seaworthy when they began the voyage (the insurer being so made responsible for all damage in the course of the voyage prior to the beginning of his insurance), provided the ship existed as a ship when it began. And if that is the true state of the law, it seems that it would have been less anomalous to hold either that the risk should be said to have a qualified extension in such case to the commencement of the voyage, or that such a ship, if seaworthy at the beginning, should be taken, with reference to that insurance, to be seaworthy till the end of her voyage, than to hold that such policies stand on a different basis from all other policies, and that there is no condition in such a policy that the ship should be seaworthy at the commencement of the contract to insure. If either "risk" or "seaworthy" could be so understood, the plea would be good after verdict, as the Judge must be taken to have so explained the law to the jury.

MR. JUSTICE MAULE. — It appears to me that the foundation of

the admitted rule, that in a policy on a voyage there is an implied condition * or warranty that the ship was seaworthy at the beginning of the voyage, is, that the parties to the policy are to be considered as contracting with reference to what is usual and of course in the transaction which is the subject of the policy ; and that it is usual, and a matter of course, to make a ship seaworthy before the commencement of a voyage. It is clear that there is no such usage with respect to the seaworthiness of a ship insured for time without any mention of place or voyage at the commencement of the voyage, or at the time of affecting the policy ; and in the absence of the usage, the condition of security does not arise. It may be, perhaps, contended that in a time policy the assured does warrant that the ship is seaworthy at the commencement of every voyage which may be undertaken during the time for which the insurance is effected. This question is not necessary to be determined in order to affirm or reverse the judgment in this writ of error ; and I am not aware that it has ever been judicially raised. I am, however, of opinion, though with some hesitation, that there is no such warranty in such a policy as this, whatever might be the case in a policy differently worded. I think this policy resembles, in this respect, a policy on a ship on a voyage with leave to make intermediate voyages ; in which case there is no warranty of seaworthiness respecting the state of the ship at the commencement of the intermediate voyages, supposing it to have been seaworthy at the beginning of the whole adventure.

I therefore answer all your Lordships' questions in the negative.

MR. BARON ALDERSON.— My Lords,— In this case it seems to me that I shall best do my duty to your Lordships by taking the first three questions together, and delivering my opinion on * 390 them. This is the * case of a time policy, and these questions raise two points : first, whether in such a policy there is an implied warranty of seaworthiness ; and, secondly, whether it is the same as that in a voyage policy, the effect and extent of which has been long settled by the decisions of our Courts. It is clearly established that in a voyage policy, there is an implied warranty that the vessel should be seaworthy, i. e. in a state as to repair, equipment, and crew, such as to be able to encounter the ordinary perils of the adventure in which the policy states it to be

then engaged. If the policy on that adventure, on the face of it, states different stages in which the perils are different, then the implied warranty follows each stage, and requires that as each occurs the ship shall be seaworthy for that stage. But it is obvious that all these implied warranties arise, and arise justly, out of a state of the adventure mentioned expressly in the policy, and are regulated and modified by that which is expressed; so that both the assured and the underwriter must know not only that they do so contract, but also the extent and modifications of the contract they then make. But if we propose to extend this law and these principles to a time policy, we shall immediately perceive how impossible it is to do so. The time policy is on the ship from the date stated in it, for a period therein fixed; it is no more. It is altogether silent as to the adventures in which the ship, during the insured period, may be engaged. How, then, is the implied warranty of seaworthiness to be known, as to its extent or modifications, from the contract itself? Again, in a voyage policy, the date at which the implied warranty of seaworthiness is to be fulfilled is the commencement of the adventure stated in the policy. The books, using unhappily, as I think, an ambiguous expression, often call this the commencement of the risk; correctly enough, no doubt, if it means the commencement of the risk of the *assured in the adventure insured, either wholly or in part, *391 by the underwriter; but incorrectly, if it means the commencement of the risk of the underwriter when he insures only a part of the risk of the assured, and begins his risk at a date in the course of the voyage. For the implied warranty of seaworthiness in the last case clearly does not date from the time of making the insurance, but from the commencement of the adventure, in the course of which the insurance is made. But how strange and inapplicable is all this to a time policy. A time policy is the insurance of a part of the general risk of the owner, and for a given period. If it is to be referred back to the time when the owner's risk commenced, the implied warranty of seaworthiness would be fulfilled if the ship was seaworthy when the owner first possessed it; for then his risk first began. But this would be absurd. The other conclusion would be to refer it to some other period without knowing where or in what situation the vessel was, or how engaged at the time of effecting the insurance; and, if so, to the commencement of some unknown adventure, which would have been ex-

pressed in a voyage policy. I conclude, therefore, that there is no analogy whatever between a time policy and a voyage policy as to this implied warranty of seaworthiness, and that all the cases as to voyage policies can do us no service in solving this question; and, indeed, there are no authorities, when the case is properly sifted, which really say so. The high authority of Mr. Justice Patteson was cited; he indeed says, "I do not know of any distinction on account of the risk being for time." I think I have pointed out several. But in that same judgment he himself adds, that there is no authority "to make the implied warranty of seaworthiness extend to every period of the voyage where the owner

could do anything for the ship, making him responsible even

* 392 though the loss should not be * caused by his omitting any of those things."

And yet if there is any warranty of seaworthiness in a time policy, it can only be a warranty resembling this in principle, i. e. one which extends over the whole time insured, and which requires the owner to do all necessary repairs whenever it is possible for him to do so. Nor is the authority of Lord Chief Justice Tindal to be taken further than this, that at all events the warranty of seaworthiness in a time policy, if it exists, is not more extensive than that in a voyage policy. I am therefore of opinion, that in the case of a time policy, the implied warranty of seaworthiness being, as it seems to me, wholly inapplicable, is not contained in it; and that the parties in such policies should make express stipulations, by which the extent and proper modification of their contract may be intelligible and ascertained.

But I do not think it necessary for the determination of this case, that this should be so. If we are to try to apply the general principles of insurance law, as it is by some said that we ought, to such a case, and to make *de novo* an implied warranty of seaworthiness in a time policy, I should adopt very nearly in terms, as the rule, the principle well expressed by Mr. Justice Lawrence, in the case of *Christie v. Secretan*,¹ adding to it, however, the qualification of Lord Mansfield in the case of the *Mills Frigate*. "The warranty of seaworthiness," says Mr. Justice Lawrence (speaking, however, of a voyage policy), "is implied from the nature of the contract. The consideration of an insurance is paid, in order that the owner of a ship which is capable of performing the voyage may be indemnified against certain contingencies, and

¹ 8 T. R. 192, 198.

supposes the possibility of the underwriter gaining the premium." Lord Mansfield's suggestion of the impossibility of the owner's knowing the * state of the ship after it has * 393 set out on the voyage, adds the reasonable modification, and shows that this possibility of the underwriter's gaining the premium must depend on the state of the ship, not at the time of the insurance effected, but at the commencement of the voyage, when the owner by himself or his agent could know it and provide for it. This is the implied warranty in a voyage policy; if so the warranty of seaworthiness in the time policy, if we are to apply these principles correctly, ought to be this, that there is in a time policy a warranty that in whatever situation or adventure the ship may be during the period insured, it shall, whenever it is in the owner's power by himself or his agents abroad to make it so, be so fitted and repaired as to be able to withstand all the ordinary dangers to which it may, by that situation or in that adventure, from time to time be exposed. For it is only against the extraordinary risks of the ship that the insurance is made.

On a voyage policy from a port, the ship must therefore be able, if seaworthy, to sustain the ordinary risk in that voyage. If insured at and from, the ship must be seaworthy at, i. e. sufficient for ordinary risks in port, and seaworthy from, i. e. fit for the voyage at the time of sailing. The owner is always, and reasonably, presumed to have the means of doing this when at a port from or at which he insures, either by himself or some agent at that port. But after the ship sails, that presumption ceases; and he is not subject to an implied warranty of seaworthiness during the whole voyage. Mr. Justice Patteson says, in *Hollingworth v. Brodrick*,¹ and most correctly, that there is no authority for saying that the implied warranty extends to making the owner liable, even when during the voyage he can do any thing for the ship, to do it at any period after the commencement of the voyage.

* Now, if this is the principle, and we try to extend it * 394 to a time policy, which is in truth a policy on the ship, perhaps during many voyages and at and from many ports, will it not be most reasonable to put it thus? The ship insured on a voyage must be seaworthy at the commencement of the voyage in the course of which the risk commences. The ship insured for time is to be on various voyages and in various harbours during the

¹ 7 A. & E. 48.

time ; it must, then, when on a voyage be seaworthy for those voyages, and when in harbour seaworthy for those harbours ; but if the risk commences when on any voyage, it must be seaworthy as if insured on that voyage, i. e. at the commencement of it. If it commences when the ship is in harbour, and preparing for the voyage, it must be seaworthy as if insured "at and from," as in *Forbes v. Wilson*.¹ But how is it possible for any one to say what the implied warranty is, or what is its extent, until he knows the fact of the situation in which, or the adventure on which, the ship is employed at the time when the insurance is effected ? There must, therefore, be an additional allegation to make it intelligible. This difficulty never can arise in a voyage policy ; for there the adventure is mentioned in the policy itself, and in the declaration framed on it ; to make, therefore, the implied warranty in a time policy intelligible and effective, such a statement must be introduced on the record by some definite allegation. It is possible, no doubt, after that allegation is introduced, to argue with some plausibility, that there may be an implied warranty, and an intelligible one, in a time policy ; and this brings me to the fourth question put by your Lordships, as to the validity of this plea ; and it

is on account of the defect in this plea, that I think it is not
*** 395** at all necessary, in order to support this judgment, to * hold

that there is no implied warranty at all of seaworthiness in a time policy. For, if the warranty does exist, still in this case it is wholly impossible to say what it means ; as there is not on the record any statement at all of the situation of, or adventure in which, this ship was employed when the insurance was effected. I agree with what fell from Mr. Justice Patteson, in *Hollingworth v. Brodrick*, where he says : " Supposing that in a time policy the assured were held to a warranty of seaworthiness at the commencement of each voyage during the time, the allegations should be shaped accordingly." Here the plea does not state whether the ship was or was not on a voyage when insured ; if it had, the words " not seaworthy at the commencement of the risk," and " not seaworthy at the time of insurance," and " not seaworthy on the 25th of September," would properly have all of them then meant at the commencement of the risk in that voyage, in the course of which the vessel was insured ; and if it was seaworthy at that period, then the plaintiff would have been entitled to succeed.

¹ 1 Park on Ins. 344.

But it seems to me a good objection to the plea, that there is nothing in it which can properly raise this, the true point in the case at all. The plea, therefore, is, in my opinion, no answer to the declaration.

MR. BARON PARKE. — The first three questions proposed by your Lordships, as well as the last, were under the consideration of my brethren and myself, by whom the present case was decided in the Court of Exchequer Chamber; but as they were not necessary for the decision of the case in the Court below, we disclaimed deciding upon them, nor were they argued there so fully, nor so much deliberated upon, as if they had been essentially necessary to the decision of the case itself.

* As your Lordships have now proposed to us the first * 396 three questions in distinct terms, it is my duty to pronounce my opinion upon them, which I proceed to do, though not with quite so much confidence or satisfaction to myself as I should have done, if they had been argued at the bar in the manner they would have been, if essentially necessary to the decision of the question in the cause. That question was simply whether the fourth plea is valid; and the only point involved in that question is, whether there is an implied condition in every policy of assurance for time, in the form of this policy, under all circumstances in which the ship shall be situated, that it should be seaworthy at the commencement of the term or the date of the policy. Unless there is, the plea is bad. I am of opinion that there is no warranty or implied condition that the ship was seaworthy at the commencement of the term; and, upon the best consideration I can give to the subject, I think I ought to advise your Lordships that there is none that the ship was seaworthy at any particular time; that there is, in fact, no warrant of seaworthiness at all.

The whole of the law upon this subject depends upon one question, whether there is any sufficiently distinct and clear authority in the common law, for annexing any condition of this sort to a policy of assurance for time.

The policy is a written instrument, which contains a number of express stipulations, but none on the subject of seaworthiness; for the notion that it was involved in the term "good ship" in policies is, I think, put an end to, for the reason stated in the judgment in

the Court of Exchequer Chamber in this case, and has been entirely abandoned in the argument at your Lordships' bar.

If, then, there is any such warranty or condition, it must be added to the written policy, as an incident annexed to the *397 contract; and that, either by the usage of trade or by * the common law of the land; from the nature of the policy itself, there is no other way in which it can be added.

The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable.

This is explained in the case of *Hutton v. Warren*.¹ But in this case there is no evidence stated on the record of such usage; and none such can be supposed to exist, unless there is evidence of it.

Such a condition may, however, be annexed as a necessary incident by the common law. The simple question is, does the common law annex any such incident? An examination of the authorities, judicial decisions, and dicta, and of text-writers on the common law, from which we derive our knowledge of that law, leaves us without any satisfactory proof that the same implied warranty or condition as to seaworthiness at the commencement of the risk, which confessedly is annexed to voyage policies, or any warranty or condition as to seaworthiness, is annexed to time policies.

In the common law of England, to be collected from these sources, there is ample authority that a warranty or condition of seaworthiness at the commencement of the risk is implied in all voyage policies, whether it has been adopted originally from the law merchant, or implied from the very nature of the contract itself. So other conditions are implied; as, not to deviate from the usual course of the voyage,—to commence it in a reasonable time,—to disclose all material circumstances;—and the *398 non-performance of * these conditions avoids the policy, whether it arises from fraudulent motives or not. This is explained at length in the accurate report of the judgment of the Court of Exchequer Chamber in the Queen's Bench Reports² (for as elsewhere reported it is full of errors), and the authorities there referred to, and they need not now be repeated.

¹ 1 M. & W. 475.

² 16 Q. B. 158.

It is undoubted law that there is an implied warranty, with respect to a policy for a voyage, that the ship should be seaworthy at the commencement of the voyage, or in port when preparing for it ; or had been seaworthy for the voyage when the voyage insured had been commenced, if the insurance is on a vessel already at sea ; which voyage being commensurate with the risk insured, the warranty is compendiously described as a warranty of seaworthiness at the commencement of the risk ; and this has led to the supposition that there is always such a warranty. It is also perfectly clear that, in our law, there is no other warranty of seaworthiness in a voyage policy, than that the ship is seaworthy at the commencement of the voyage. There is no warranty in the law of England that the vessel shall continue seaworthy after the voyage has commenced ; none that the crew, if originally competent, shall continue so ; none that the vessel shall be navigated with due care and skill during the voyage ; none that pilots shall be taken on board at proper places, if the voyage has already commenced, unless, perhaps, where required by Act of Parliament ; none, on an insurance for one voyage out and home, that the ship shall be seaworthy on the return voyage ; — although these might all be very reasonable conditions to be imposed on the assured for the benefit of the underwriters, and which have been by law or custom imposed * upon American underwriters : for * 399 in all these respects our law differs from the law of the United States, in which it is the acknowledged rule, that the assured must not only have his vessel seaworthy at the commencement of his voyage, but keep it so, so far as depends upon himself, during its continuance ; and the underwriters are discharged from any loss which is distinctly shown to have arisen from the negligence or misconduct of the assured, in not keeping the ship in a perfect state. The authorities are cited by Mr. Arnould, in his excellent book on Insurance.¹

The only warranty, then, as to seaworthiness in a voyage policy, recognised by our law, is, according to all the authorities, that the vessel was seaworthy at the commencement of the voyage. But it is equally clear that there is no satisfactory decision, dictum of a judge, or authority of a text-writer, that there is any such warranty of seaworthiness at the commencement of the term in a time policy.

¹ Vol. I. § 247, p. 666.

The Court of Queen's Bench proceeded, in their judgment in this case, on two suppositions: first, that the opinion of all the lawyers in modern times was clear, that there was no difference between a time policy and one for a particular voyage, as to the implied warranty of seaworthiness; and that the same point was settled by the case of *Sadler v. Dixon*,¹ following that of *Hollingworth v. Brodrick*.² The judgment of the Court of Exchequer Chamber states the grounds for holding that the Court of Queen's Bench was mistaken in both these respects.

As to the first, the Judges then present were not, nor am I now, aware of any such prevailing opinion in the profession; and as to the opinion of text-writers, the authorities cited in the judgment

show that this question was a matter yet unsettled. Mr.

* 400 Arnould, after stating³ that a question * has been raised whether the extent and meaning of the implied warranty is the same in a time as a voyage policy, states that the better opinion is, that it is, but that the question will afterwards be fully discussed by him; and subsequently⁴ discusses it, and intimates his notion as to time policies, that the implied warranty is, that the ship should be seaworthy when it sails under the policy for the voyage or course of navigation on which it is contemplated to be employed during the term; and what that voyage is, is a matter of evidence. This is not the same proposition as that the vessel must be seaworthy at the moment that the term commences, wherever it may then be, but quite a different one. He refers for that position to the case of *Alexander v. Pratt*, which came on in the Court of Exchequer, 24th January, 1846, where a vessel was insured for twelve months from the date of its arrival at Sydney; in which the question was discussed whether, when the vessel sailed on the intended voyage from Sydney, it was not required to be seaworthy for that voyage. He says the Court intimated its opinion that the vessel should be seaworthy for the voyage then intended; but the pleadings did not raise the question, and the cause was sent down to a new trial, with power to amend them, in order to raise it; and the cause was settled. This case in effect decided nothing; and it was so little the subject of argument at the bar, that I have no note of it, though I have of all cases of the least importance at that period.

¹ 8 M. & W. 895.

² 7 A. & E. 40.

³ Vol. I. § 154, p. 411.

⁴ Vol. I. § 248, p. 670.

Mr. Serjeant Marshall,¹ not having his attention directed to the distinction between time and other policies, lays it down that the ship insured must be seaworthy at the time of sailing, not at the commencement of the risk ; and the late Mr. Justice Park, in his work on insurance,² * states the time of insurance to * 401 be the period at which the vessel was to be seaworthy, — certainly an inaccurate proposition, and probably not intended to be so understood, as one of the authorities cited by him refers to the commencement of the voyage, and the other is a mere illustration of Lord Mansfield's, in *Carter v. Boehm*,³ where the interest in a fort was insured for time, and his Lordship said that the utmost that could be contended for was, that the underwriter trusted to the fort being in the condition in which it ought to be, in like manner as it is taken for granted that a ship insured is seaworthy ; but at what time the fort ought to be in that state was quite immaterial upon the facts, as in the opinion of the Court it was so at the time of the commencement of the term insured, and at the time of making the policy the fort was certainly lost. So that Lord Mansfield never could have meant to say that seaworthiness was necessary at the time of the loss.

Mr. Phillips, an American author of repute, in his Treatise on Insurance,⁴ does not appear to think this a settled point in America. He refers to the opinion of the American Chief Justice Shaw, who says that, whether the rule of seaworthiness would apply when the ship had been on a long voyage, was a matter of doubt, and, if it did, it must be understood with great latitude, and he cites *Paddock v. Franklin Insurance Company*.⁵

So far, therefore, as relates to the opinion of the text-writers, the proposition in the judgment of the Court of Queen's Bench is by no means made out ; nor is the judgment supported by any one of the authorities referred to as deciding the question.

In the first case, *Hollingworth v. Brodrick*,⁶ the plea was, that after the term commenced, and before the * loss, the * 402 vessel became unseaworthy, and might have been repaired at a reasonable expense, and that the ship remained unseaworthy at the time of the loss : and the Court decided that plea to be insufficient, being of opinion that a state of unseaworthiness during

¹ Ins. Vol. I. p. 151.

⁴ Vol. I. p. 328.

² Page 450.

⁵ 11 Pick. 227.

³ 3 Burr. 1915.

⁶ 7 A. & E. 40.

the voyage could not be a defence, unless, at all events, it was shown to be the cause of the loss, if indeed that would make any difference (as it would not).

Nothing was decided as to there being any implied warranty in time policies, as a condition precedent to the policy attaching, or as to the time to which that warranty relates. The only part of the case bearing upon the present question is the dictum of Mr. Justice Patteson in the course of his judgment. But the learned Judge was evidently speaking with reference to that case, in which the question was, whether there was any implied condition as to keeping the vessel in repair after the term commenced ; and, if it meant more than that there was no difference between a time policy and a voyage policy in that respect, and that there was a warranty or implied condition of seaworthiness at the commencement of the term, it is of less weight, because that question was quite foreign to that case, and did not arise at all in it. Nor did the case of *Sadler v. Dixon*¹ settle that point ; on the contrary, the judgment of the Court of Exchequer expressly states the point to be unsettled ; and it decided merely that the implied warranty was at least not more extensive than that on a policy on a voyage ; and that if there was no contract for the conduct of the crew in one case, there was none in the other. When this judgment of the Court of Exchequer was affirmed, Lord Chief Justice Tindal

used some expressions which were contended before us to *403 amount to an *opinion, that the implied warranty of seaworthiness was the same in a time and a voyage policy, and applied to the commencement of the risk. But it is clear from the context that no such position was meant to be positively laid down ; but only that the obligation of the assured on a time policy was, after the policy attached, not more extensive than that on a voyage policy, and did not require the assured to keep the vessel in a seaworthy state. The period to which the warranty of seaworthiness attached was wholly immaterial in that case.

The only other case cited before your Lordships was that of *Hucks v. Thornton*.² That was a decision of Lord Chief Justice Gibbs at Nisi Prius, in a trial on a time policy on a whaling voyage, with liberty of cruising for prize ; and he held that it was enough to satisfy the implied warranty of seaworthiness if, at the

¹ 5 M. & W. 205, 8 M. & W. 895.

² Holt, N. P. 30.

commencement of the time, the ship had a crew fit for one of the purposes, though unfit for the other.

It may be inferred, from the fact of Chief Justice Gibbs leaving that case to the jury, that he thought that there was in a time policy an implied warranty or condition of seaworthiness, of some sort, at the commencement of the term for which the ship was insured. But the facts may not have made it necessary for him to give that question much consideration, as the plaintiff was likely to succeed even if there was such a warranty ; and at all events it was no more than a *Nisi Prius* opinion ; and as the decision was in favour of the plaintiff, and the propriety of it could not be questioned by a motion for a new trial, it is of much less weight.

In this state of the dicta and decisions on the subject of warranties of seaworthiness on time policies (and these are * all), it is impossible to say that they supply satisfactory * 404 proof that there is any warranty of seaworthiness at the time of the commencement of the term. The decisions distinctly show that there is none that the ship is to continue seaworthy for the term. In truth there is only one *Nisi Prius* decision in support of the proposition that there is such a warranty as to the commencement of the term. From the course the cause took, it could not be afterwards questioned ; and the dicta referred to are explained by the context, or are extra-judicial. It lies upon those who seek to add another condition to a written contract, not expressed, where there is no evidence of usage of trade, to show that the law implied it. These authorities are of themselves, in my judgment, quite inadequate for such a purpose.

If, however, precisely the same principle applied to both the case of a voyage and a time policy, if they were exactly analogous in this respect, less positive authority might be required ; and it might be thought that these, at best slender authorities, would be sufficient. Perhaps even without them such a condition might be implied, if the cases were similar ; but they certainly are not. In a voyage policy, the owner of a ship has, generally speaking, the power to make the ship seaworthy at the commencement of the voyage. In the ordinary course of navigation he always does so for his own sake ; he is bound to do so for the safety of his crew, and for the safety of the cargo placed on board ; he contracts with every shipper of goods that he will do so. The shipper of

goods has a right to expect a seaworthy ship, and may sue the shipowner if it is not. Hence, the usual course being that the assured can and may secure the seaworthiness of the ship,—either directly, if he is the owner, or indirectly, if he is the shipper,—it is by no means unreasonable to imply such a contract in a policy on a ship on a voyage, and so the law most clearly has implied it.

*405 * It may happen indeed, in some cases, from the want of proper materials, of skilful artisans, of proper docks in the port of outfit, of sufficient funds or credit, or from the hidden nature of defects, that the owner may not be able to fulfil the duty of making the ship seaworthy at the commencement of the voyage ; but the law cannot regard these exceptional cases, “*Ad ea quæ frequentius accident jura adaptantur*” ; and it wisely, therefore, lays down a general rule, which is a most reasonable one in the vast majority of voyage policies, that the assured impliedly contracts to do that which he ought to do on and before the commencement of the voyage ; that is, to make the ship seaworthy at the commencement of it, and in part, *quoad hoc*, in the preparation for it. The contract contained in the policy imposes on him no duties which were not incumbent on him before. But how different is in general the case of one who insures for a time ! He does not necessarily know the position of his vessel at the commencement of the term ; if the term commences whilst the vessel is absent from a port, he cannot, generally speaking, cause it thus to be repaired ; and no care or expense of himself or agent could secure that object. The ship may have lost anchor, or sails, or rudder ; part of the crew may have deserted, or be dead of malignant fever. All these deficiencies, generally speaking, are such that no care or expense could have prevented or cured. How unreasonable, then, would it be for the law to hold that there was in every case added to a policy, which is silent on the subject, a condition which, in most cases, it would be impossible for the assured to fulfil !

These considerations render a time policy essentially different from one on a ship. They are powerful arguments against implying a condition of seaworthiness by a party who generally has it not in his power to fulfil it; nor is it satisfactory to say that *406 the condition ought to be implied in * all cases where it actually is in the power of the party to fulfil it, for the law

usually acts by general rules, and the maxim which I have quoted is clearly applicable.

Nor is it an answer to say that a more liberal construction of the term "seaworthy" in time policies might obviate this objection, and that a different degree of seaworthiness is sufficient for the completion of a voyage already begun, than would be necessary for the entire voyage; that a ship which was in the commencement of the voyage perfectly seaworthy in respect of the state of hull, equipment, and stores, would be still seaworthy for this purpose, though in the middle of the voyage, when the time policy should attach, the hull had suffered by wear and tear, the stores had been diminished, or the equipment deteriorated; for it still might be reasonably capable of performing the rest of the voyage. Doubtless this is true; but any laxity of the term "seaworthy" would not provide for the cases of losses of the anchors, rudder, or masts, or sails, or crew, or of irreparable sea damage, after incurring which no vessel could, in the most loose interpretation of the term, be considered as seaworthy.

I therefore come to the conclusion, from these premises, that there is not, in the case of a time policy, an implied warranty or condition that the vessel must be seaworthy at the commencement of the term insured. I feel no doubt that this condition cannot be implied. I am equally clear that there is no implied warranty or condition that the ship insured shall be seaworthy at the date of insurance. There is a total absence of authority for this, if I except the part I have already quoted from Mr. Justice Park's book, and which is, for the reason above given, evidently an unintentional inaccuracy of expression. And, indeed, the expression in this policy, "lost or not lost," which means lost or not lost when the policy was effected, totally excludes all *idea *407 of an implied warranty or condition that the ship was then seaworthy.

Two other cases of implied warranty or condition of seaworthiness may be suggested in which there is more doubt. One, that the ship was seaworthy at the commencement of the voyage, of which the time insured by the time policy was part; as, for instance, if the ship sailed on the 1st June, 1850, on a voyage from Liverpool to the East Indies and China and back, a voyage which might probably last two years, and the time policy, being meant to cover part of that voyage, was from the 1st of June,

1850, to the 1st of June 1851, would there be any implied warranty or condition that the ship was seaworthy when it sailed from Liverpool? Would there be any if the time policy expressly stated on the face of it, that the time was part of that voyage, as, for instance, that the ship was insured from the 1st June, 1850, to the 1st June, 1851, on a voyage from Liverpool to the East Indies and China and back? Upon this question I cannot answer your Lordships with so much confidence as upon the other. My opinion might possibly be qualified, or altered, by a more solemn argument, where those were the questions upon which the decision was to turn; but I now answer them by saying, that it seems to me that there is no warranty in either case, for this short reason, because I cannot find any satisfactory authority in the law of England for annexing such an implied condition or warranty to a written insurance, which *prima facie* contains all the terms upon which the parties contract, though there is much more reason for implying such a contract than one of seaworthiness at the commencement of the term, inasmuch as it was competent, generally speaking, for the assured to secure the performance of such a condition, a condition of seaworthiness at the commencement of the voyage, and in the ordinary course of navigation he would do so.

* 408 * The absence of these implied warranties will not practically be attended with the mischief which it is said they are calculated to prevent. In cases in which the assured wilfully permits the ship to sail, or knows that it has sailed, on the voyage of which the time policy covers part, in an unseaworthy state, the insurance would be void on the ground of the concealment of a material circumstance, and this will prevent the frequency of such an occurrence; and in all cases in which the underwriter wishes to be secure against such a contingency, he may take care to provide for it in the policy by introducing a warranty of seaworthiness at the commencement of the risk or voyage, which, however, would lead to a diminution of the premium.

The answers to the first three questions will lead your Lordships to conclude that my answer to the last question is, that the plea is clearly bad. The meaning of the term "commencement of the risk," used in the plea, is clearly the commencement of the risk which the underwriters are to take on themselves, the commencement of their liability; that is, the commencement of the

term of insurance. If there was no implied contract or condition of seaworthiness at the commencement of the risk or term (which is the same thing), there was none of seaworthiness on the 25th of September, and certainly none of seaworthiness at the date of the policy ; for the policy is "lost or not lost." Therefore it is utterly immaterial whether the ship was seaworthy or unseaworthy at any of these periods, and the plea is clearly bad.

LORD CHIEF BARON POLLOCK.— Adverting to the record and proceedings in this case, I am of opinion that the policy is not subject to any implied condition or warranty that the ship was seaworthy. This is the plain obvious meaning of the language used by the *contracting parties, looking to the policy alone. * 409 There is no such condition or warranty to be found in the policy itself. The use of the epithet "good" applied to the ship conveys no such warranty, as has been already observed by more than one of my learned brothers. And apart from any other consideration *dehors* the policy, this is in my judgment the construction which a Court of Law ought to put upon the contract entered into between the parties. It is a contract of indemnity against certain perils to which the ship may be exposed. Any fraud or any concealment of any matter material for the consideration of the underwriter would vitiate the contract. But it contains no condition or warranty as to the state of the vessel, as to which it is to be assumed that the assured knew no more than the underwriter ; for if he did, and it was material, he would have been bound to communicate it. The arguments in favour of the opposite conclusion, viz. that there is an implied condition or warranty of seaworthiness, are plausible, and at first sight not without apparent force ; but I think they are not sound. As far as they are founded upon the public advantages of such a condition, and its tendency to protect the lives and secure the property of those who embark in marine adventures, I think they ought not to influence our judgment. Our duty is to expound contracts according to the lawful intentions of the parties who make them, expressed by the language they have used ; and we are not at liberty to insert or imply a condition of seaworthiness (on account of what we may deem to be its general importance or its beneficial public results), unless we are satisfied that such was the undoubted meaning of the contracting parties. But as far as they are founded on the established

and now recognised usage, custom, or practice, which has obtained among merchants and underwriters in all voyage policies, that

there is an implied condition of seaworthiness, the opposing.

* 410 arguments * are entitled to careful examination and attentive consideration. It is urged that, as in all policies of insurance for a voyage, there is such a condition or warranty, therefore there ought to be, and it must be implied that there is, some such condition in a policy for time. No doubt, in the ordinary contract of insurance for a voyage, there is an implied condition or warranty that the ship was seaworthy when it sailed, if the voyage has begun; or shall be rendered seaworthy before it sails, if the voyage has not begun; and this condition is implied, whether the insurance is on ship or on goods. And if we put the case of an ordinary insurance for a voyage enlarged into an insurance for time, beginning the adventure or risk with the sailing on a certain voyage from a given port, and continuing it for a given time, I should think there would be in such a case an implied condition that the ship was seaworthy at the time of sailing on the voyage; and I should conclude that the commencement of the risk by the sailing on the voyage was introduced with the very object of thereby creating the implied condition. So if such were the original terms of the policy, that is, if a time policy commenced not with a day certain, but with the sailing of the ship on a particular voyage, the risk to be continued for a time certain, and not merely to the end of the voyage, I think it might reasonably be contended, without any special words of contract, that the known and established condition of seaworthiness at the commencement of the voyage ought to be imported into or implied in such a policy. Now, considering that time policies have been to some extent introduced instead of voyage policies, the latter having always some reference to some condition or warranty of seaworthiness, it is a very plausible suggestion that those who enter into contracts or policies for time must have some reference to some condition or warranty of seaworthiness, either at the commencement * 411 * of the risk, or at the date of the contract, or at the commencement of the voyage, or at some antecedent period. But it appears to me to be so difficult to frame any condition or warranty that shall in all cases (perhaps in any) be analogous or equivalent to the well-known condition or warranty in a voyage policy, that I think we are not justified in making a contract for

he parties which they have not made for themselves ; even if we had more certainty than I think we possess, that the contract in the new form was made with some reference to the long-established condition or warranty which no doubt exists in the old form. The condition or warranty of seaworthiness in a voyage policy has been long established and settled. The assured, in addition to the total absence of fraud (which the law requires in all contracts), in addition to the fairest and fullest communication of every material circumstance that can affect the risk or contract (which is not required in all commercial dealings), is bound by an implied condition or warranty that the ship is seaworthy at the time of sailing, or shall be rendered so before it sails ; and he is bound by this condition, though he may have no means of knowing the fact one way or the other, and may have little or no personal control over the matter, which is generally the case as to a policy on goods ; and the question is, Does this implied condition apply to a policy for time ? A policy which takes up the vessel in port or at sea, employed or unemployed, earning a freight or seeking a cargo, undergoing repairs or encountering a storm ; a policy which would no doubt attach to the vessel, if it existed as a ship, though, abandoned by the crew to save their lives, it might be speedily about to founder in the open sea or to perish on a rocky shore. Now, what condition or warranty of seaworthiness can be presumed or implied in such a contract as this, applying to and attaching under such a variety of circumstances ?

*Can it be a condition or warranty of seaworthiness at the *412 time of entering into the contract ? In pursuing this inquiry, if the condition implied in a voyage policy is the ground and foundation of the argument that we should and must imply such a condition in a time policy, we must follow the analogy strictly. We are not at liberty to mould it and fashion it, to contract or expand it, as we may think reasonable, and adapt it to any varying circumstances that may come before us. In a voyage policy, it is quite clear that there is no condition or warranty of seaworthiness at the time of entering into the contract. In a case of a voyage policy, the vessel at the time of the contract may have encountered perils which have rendered it utterly unseaworthy ; nay, it may already have been lost. The analogy of a voyage policy, therefore, cannot justify our implying a condition or warranty of seaworthiness at the time of entering into the contract.

But can we imply such a condition with reference to the time when the liability of the underwriters commenced; that is, the commencement of the time during which the contract of indemnity is to last? Here, again, all analogy fails. Put the case of a voyage policy of this sort. A ship is known to have sailed, on the 1st of January, on a voyage to the East Indies. On the 1st of February the owner proposes to insure it, but only from that day, for the remainder of the voyage, taking upon himself the risk of antecedent loss or damage. Or, a similar case may be put of the expression "lost or not lost," being left out of the policy. In such a contract there would be an implied condition that the vessel was seaworthy on the 1st of January, when it sailed on the voyage; but not that it was seaworthy on the 1st of February, when the underwriter's risk would commence. As, therefore, the analogy of a voyage policy will not justify our implying such a condition or warranty at the date of the contract or the

*413 commencement * of the risk, it seems to me that the only form of condition or warranty that can, with any semblance of reason, be even suggested is, that the vessel was seaworthy, not at the time of making the contract, nor at the time of the risk commencing, but at some antecedent period, viz. at the commencement of some voyage, either that on which the vessel may be then sailing when the contract is made, or that on which it was sailing at the commencement of the risk, or the last antecedent voyage, or the next succeeding voyage, or all or any of them. But how can any of these modes of implying a condition, even if they could be derived by analogy from a voyage policy (which I think they cannot) be applied to vessels employed in such short voyages as from Dover to Calais; or to vessels regularly sailing between any two ports but a few miles distant from each other; or engaged in a whaling voyage, which may last for years, though a time policy is allowed to endure for one year only; or to a ship that has been insured for time, and for time only, during the whole period of its existence? What voyage, in such cases, can be selected, at the commencement of which we can imply a condition or warranty of seaworthiness? Or, is there such a condition applicable to every fresh voyage commenced by the vessel during the time? This, however, cannot be, for no such condition or warranty arises as to subsequent sailings in the case of a voyage policy. For, if a ship is insured for several voyages in succession,

ll as one adventure, as if a ship is insured on a voyage from London to China, from China to Calcutta, and thence back again to London, with the power to make and the possibility of making several intermediate voyages, in such a case it is quite sufficient that the vessel was seaworthy when it sailed from London, the commencement of the whole adventure; and becoming unseaworthy afterwards and sailing in that condition from an intermediate * port is no breach of the condition or warranty. To try the conclusion to be drawn from this with reference to time policies, let me put the case of a ship insured for time from the 1st of January, 1851, to the 31st of December, 1851, both days inclusive, and sailing on the 13th of December, 1851, on a voyage from London to the Cape of Good Hope; and then at the end of the year a fresh policy for another year is effected with the same or other underwriters; in the case of the same underwriters, would there be in the new policy a condition or warranty of seaworthiness at the time of sailing on the voyage to the Cape of Good Hope, there being no such condition in the old policy? It appears to me very clearly not; and if so, neither would there be with a different underwriter, otherwise the same contract in words would have a different meaning, according as it might be made with the same or with different underwriters.

The result of all this satisfies my mind that an insurance for time is wholly independent of seaworthiness at any time whatever, and is effected merely on the footing of its being without fraud, in perfect good faith, and with the fullest communication of all material circumstances. The truth is, the substance of the implied condition in a voyage policy is that at the commencement of the voyage insured the ship was or shall be seaworthy; and there is no condition with reference to any antecedent or subsequent time, period, or event. If, therefore, an insurance is effected for time only, without reference to any voyage at all, I do not see how a Court of Law can imply any condition whatever of seaworthiness. And we must not overlook this, that it may be that this form or mode of insuring has been adopted for this very reason; that thereby the assured gets rid of a condition or warranty relating to a matter of which he * may have no knowledge whatever, and over which he may have a very imperfect control. * 415

On the subject of the authorities, I entirely concur with the

judgment delivered by my brother Parke in the Court below. This point has never yet been decided ; and so it was admitted by the Council at your Lordships' bar. It is a mistake to suppose that there has been any decision at all binding on a Court of Law as an authority on the subject, though there may have been expressions, *obiter dicta*, on the subject, entitled to great respect, which already have been stated by my learned brothers who have preceded me.

We are then at perfect liberty, and indeed it is our duty, to consider the question upon principle ; and I have endeavoured to state the grounds upon which I have arrived at the conclusion that my answer to your Lordships' first three questions is, that in this case the policy is not subject to any implied condition or warranty of seaworthiness of any description whatever ; and, therefore, my answer to the last question must be, that the plea which is founded on a supposed implied warranty or condition of seaworthiness is not valid in law, and is no answer to the action.

June 3.

LORD ST. LEONARDS (having stated the nature of the case, and the difference of opinion upon it among the Judges in the Courts below and in this House) said : —

The opinion of the majority of the Judges is that which I entertained at the close of the argument, and it has not been shaken by the arguments of the two learned Judges who supported the judgment of the Court of Queen's Bench. In a voyage policy, where the contract shows the nature of the adventure, from which the intent of the parties may be collected, the law implies a consideration of seaworthiness to perform the voyage. This * 416 has long been a settled rule ; * but no such rule has ever prevailed in regard to time policies. There being no such rule, I think your Lordships cannot imply a condition in this case, where there is nothing on the face of the contract to warrant it.

Assuming the ship to be on a voyage when the time insured in a time policy begins, all analogy fails between the case of a voyage policy and a time policy ; and the very argument in this case proves that seaworthiness is not an implied condition in a time policy, warranted by custom and allowed by law. In such a policy neither party can be supposed to know the state of the ship when the risk commenced, and therefore it will be unreasonable to

imply a condition of seaworthiness at that period. In the case of a policy for a voyage the condition implied is, that the vessel is seaworthy at the commencement of the voyage, not that it shall continue so. If, therefore, a time policy effected upon a ship, then on a voyage, should be held to be subject to an implied condition in analogy to the other case, it would seem to follow that the underwriter who undertook to indemnify the assured for the period named must take the risk of the state in which the ship is from the beginning of that period, if the ship should be then at sea. A voyage policy would cover the voyage, and any unseaworthiness during the voyage could not affect the policy. A time policy effected during the voyage, for a period beginning while the ship is on the voyage, should, I think, at all events, be held to cast the risk on the underwriter just as he must have borne it at the period in question under a voyage policy. The analogy could not be carried further, if even the time contract declared that the ship was then on a particular voyage.

If the assured was guilty of any fraud or concealment, that would of itself avoid the policy, and therefore the condition * contended for in time policies is not necessary to * 417 guard against fraud or concealment.

If the ship had been lost after the commencement of the risk, viz. the 25th of September, 1843, though that was before the date of the contract, the underwriter would have been liable by the terms of his contract. It is clear, therefore, that no condition of seaworthiness at the date of the contract can be implied. Such a condition, therefore, if to be implied, could, in this case, only be implied at the commencement of the voyage; but there was no allegation as to any unseaworthiness at the commencement of this particular voyage, and Courts of justice must act upon a rule general in its application.

If, however, a ship was about to sail upon a particular voyage, and a time policy was effected, instead of a policy on the intended voyage, as at present advised, I think that a condition could be implied that the ship was seaworthy at the commencement of the voyage. But that is not this case. Any supposed difficulty on the part of underwriters may readily be obviated by the insertion in time policies of an express warranty of seaworthiness at the commencement of the risk. I do not trouble your Lordships with the state of the pleadings, because it is admitted that the conten-

judgment delivered by my brother Parke in the Court below. This point has never yet been decided ; and so it was admitted by the Council at your Lordships' bar. It is a mistake to suppose that there has been any decision at all binding on a Court of Law as an authority on the subject, though there may have been expressions, *obiter dicta*, on the subject, entitled to great respect, which already have been stated by my learned brothers who have preceded me.

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Assuming the ship to be on a voyage when the time insured in a time policy begins, all analogy fails between the case of a voyage policy and a time policy ; and the very argument in this case proves that seaworthiness is not an implied condition in a time policy, warranted by custom and allowed by law. In such a policy neither party can be supposed to know the state of the ship when the risk commenced, and therefore it will be unreasonable to

imply a condition of seaworthiness at that period. In the case of a policy for a voyage the condition implied is, that the vessel is seaworthy at the commencement of the voyage, not that it shall continue so. If, therefore, a time policy effected upon a ship, then on a voyage, should be held to be subject to an implied condition in analogy to the other case, it would seem to follow that the underwriter who undertook to indemnify the assured for the period named must take the risk of the state in which the ship is from the beginning of that period, if the ship should be then at sea. A voyage policy would cover the voyage, and any unseaworthiness during the voyage could not affect the policy. A time policy effected during the voyage, for a period beginning while the ship is on the voyage, should, I think, at all events, be held to cast the risk on the underwriter just as he must have borne it at the period in question under a voyage policy. The analogy could not be carried further, if even the time contract declared that the ship was then on a particular voyage.

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If, however, a ship was about to sail upon a particular voyage, and a time policy was effected, instead of a policy on the intended voyage, as at present advised, I think that a condition could be implied that the ship was seaworthy at the commencement of the voyage. But that is not this case. Any supposed difficulty on the part of underwriters may readily be obviated by the insertion in time policies of an express warranty of seaworthiness at the commencement of the risk. I do not trouble your Lordships with the state of the pleadings, because it is admitted that the conten-

tion of the plaintiff in error cannot be maintained unless there is an implied condition in every policy for time, like that in this case, wherever the ship may be, that it was seaworthy at the commencement of the risk or the date of the policy. No such condition can, I think, be implied ; and therefore I advise your Lordships to affirm the judgment of the Court of Exchequer Chamber.

LORD CAMPBELL. — My Lords, I entirely agree in the opinion of my noble and learned friend who presided on the woolsack

* 418 when this * case was argued at your Lordships' bar, that the defendant in error is entitled to our judgment. The allegations in the plea of want of seaworthiness, although proved to the satisfaction of the jury, do not appear to me to constitute a defence to the action. I do not proceed upon the literal meaning of the word "seaworthy" which was contended for. Without regard to its literal or primary meaning, I assume it to be now used and understood to state that the ship is in a condition, in all respects, to render it reasonably safe where it happens to be at any particular time referred to, whether in a dock, in a harbour, in a river, or traversing the ocean.

The question raised by this record is, whether upon a policy of insurance on a ship for time, in the form of that set out in this declaration, there is an implied condition that when the policy ought to attach and the risk to commence the ship shall be seaworthy, that is to say, in a proper state of repair and equipment with reference to the situation in which it may then happen to be ? It is incumbent on the underwriter, who here denies his liability, to show that in every time policy there is such a condition ; for neither the declaration nor the plea discloses any facts from which the condition is to be implied in this case, if it is not to be implied universally.

There is no custom or usage of trade respecting time policies, which we can take notice of, which affirms the existence of such an implied condition ; and after an examination of all the authorities which have been cited on the subject, I think it quite clear that there is none to guide us to declare that such an implied condition does exist. The two decisions mainly relied upon, of *Sadler v. Dixon*,¹ and *Hollingworth v. Brodrick*,² have no application

¹ 5 M. & W. 405, 8 M. & W. 895.

² 7 A. & E. 40.

to the *question of seaworthiness under a time policy at * 419 the commencement of the risk ; and some casual expressions which may have dropped in those cases from learned Judges, when this question was not at all under their consideration, are entitled to no weight. Nor do the American or Continental Jurists, on the present occasion, afford us any aid.

The underwriter is therefore driven to contend, that because in policies on ship "from," or "at and from" a specified port to another specified port, or back to the port of outfit (commonly called "voyage policies"), there certainly is such an implied condition, the same condition is to be implied in policies from a particular day to a particular day (commonly called "time policies"), without reference to the local situation of the ship when the risk commences or terminates.

With regard to voyage policies, we have usage and authority establishing the implied condition as certainly as any point of insurance law. These being wanting as to the extension of the doctrine to time policies, the reasoning must be, that as far as this condition is concerned, the contract by time policies rests on the same principles, and that no distinction can be made between them. The condition may have been implied in voyage policies from considering that probably both the contracting parties contemplated the state of the ship when the risk is to begin, that this state must be supposed to be known to the shipowner, that he has it in his power to put the ship into good repair before the voyage begins ; that to prevent fraud, and to guard the safety of the crew and the cargo, this obligation ought to be cast upon him before he can be entitled to any indemnity in case of loss ; and above all, that this implied condition in voyage policies is essentially conducive to the object of marine insurance, by enabling the shipowner, on payment of an adequate premium, and acting with honesty and securing *reasonable diligence, to be sure of * 420 full indemnity in case the ship should be lost or damaged during the voyage insured ; but time policies are usually effected when the ship is at a distance, the risk being very likely to commence when it is actually at sea. Under those circumstances, is it at all likely that either party would contract with reference to the actual state of the ship at that time with respect to repairs and equipments ? The shipowner probably knows as little upon this subject as the underwriter. Any information which he has re-

ceived tending to show that the ship is in extraordinary peril he is bound to disclose, or the insurance effected by him is void ; but is it reasonable to suppose that he enters into a warranty or submits to a condition which may avoid the policy with respect to a state of facts of which he can know nothing ? We must further consider that this condition, in many cases, he may have no power to perform. Above all, if this condition was implied in time policies, their object might often be defeated, and the shipowner, acting with all diligence, and with the most perfect good faith, might altogether lose the indemnity for which he had bargained.

Take as an example this policy, which is on the ship Susan, from the 25th of September, 1843, to the 24th of September, 1844.

This vessel may have been employed on the South Sea fishery. It may have sailed from an island in the beginning of September, 1843, in all respects in a seaworthy state ; but before the 25th day of that month may have encountered a gale of wind in which the sails may have been carried away, and other damage may have been sustained, and the master may have died of a malignant fever ; but the ship touches at another island on the 26th of September, is

*421 completely re-equipped, takes on board a new master of competent skill, and prosecutes the adventure. *After-

wards, and before the 24th of September, 1844, the ship may be crushed between two icebergs. For any thing that appears on the record, such may have been the history of the Susan ; and these facts are consistent with all the allegations in the declaration and in the plea. On this hypothesis the owner could not be indemnified, because the ship was not seaworthy when the risk was to commence, namely, on the 25th of September, 1843. If there is a condition — an implied condition — that the ship must then be seaworthy, the policy neither attached then nor at any subsequent time, and the owner's only remedy would be to recover back the premium he had paid to the underwriters. Thus your Lordships are called upon to imply a condition which the parties could not have contemplated, which the assured had no power to perform, and which would effectually defeat the object of the contract. If the loss is caused by any culpable negligence of the shipowner, that may be a defence to the underwriter ; but if the shipowner acts with good faith and reasonable diligence, it is surely much more according to the principles of insurance laws,

and of common sense, that the risk of the ship not being seaworthy when the liability of the underwriter ought to begin, should be cast upon him, who can easily indemnify himself by demanding an adequate premium for undertaking it.

The only consideration pointed out for extending the implied condition of seaworthiness to time policies, which made any impression upon me, is that it does extend to voyage policies on goods, although the assured can have no control over the repairs or equipment of the ship. But between the assured on goods and the underwriter there is the shipowner, who must be considered the agent of the assured, and he does undertake that the ship shall be tight, staunch, and strong, and every way fitted for the voyage. If this undertaking is broken, the merchant has no remedy against * the underwriter, but he obtains a full indemnity * 422 by suing the shipowner, and thus, either with the shipowner or the underwriter, the merchant is secure; so that the implied condition in his policy in no respect interferes with the object of insurance, or with the interests of commerce.

If your Lordships shall be pleased, on the motion of my noble and learned friend, to affirm the judgment of the Court of Exchequer Chamber in this case, it will be definitively established that, by the law of England, in a time policy such as this, no special circumstances being stated in the declaration or the plea respecting the situation or employment of the ship, there is not an implied condition that the ship should be seaworthy on the day when the policy ought to attach.

The other questions which were debated at the Bar, and which were propounded to her Majesty's Judges, must be open for judicial consideration when they arise; but as your Lordships considered it expedient, for general information and for the advantage of the commercial world, that opinions should be given upon this very important subject, although they would not be binding, I think it right to say that, after great deliberation, I agree with those Judges who think that in a time policy there is no implied condition whatever as to seaworthiness. I never for a moment could concur in the notion that there was an implied warranty that the ship was seaworthy when it sailed on the voyage during which the policy attached. To lay down such a rule would, I think, be a very arbitrary and capricious proceeding, and, being wholly un-sanctioned by usage or by judicial authority, would be legislating

instead of declaring the law. I likewise think that it would be very inexpedient legislation, as constant disputes would arise in

construing the rule; for in fishing adventures, and where

* 423 ships are * employed for years in trading in distant regions

from port to port, the instances in which time policies are chiefly resorted to, there would be infinite difficulty in determining what was the commencement of the voyage during which the policy attaches. There would be a similar difficulty as to the *terminus ad quem*, in considering what the voyage truly is for which the ship must be fit.

I have hesitated more upon the question whether, when a time policy is effected upon an outward-bound ship lying in a British port where the owner resides, a condition of seaworthiness is to be implied. This might be an exception to the general rule, that in time policies there is no implied warranty of seaworthiness, and it is free from some strong objections to the condition of seaworthiness being implied where the risk is to commence abroad. But in addition to the objection that as yet there has been no instance of an implied condition of seaworthiness in any time policy, and that the general rule is against such a condition, this would be a gratuitous and judge-made exception to the rule. I think it more expedient that the rule should remain without any exception, and, as at present advised, I should decide against the implied condition in all cases of time policies. There is a broad distinction which may always be observed between time policies and voyage policies; but when you come to subdivide time policies into such where the ship is in a British port and where the ship is abroad, and still more if the residence of the shipowner is to be inquired into and regarded, there would be a great danger of confusion being occasioned by the attempted classification. It is most desirable that in commercial transactions there should be plain rules to go by, without qualification or exception. Marine insurance has been found

most beneficial, as hitherto regulated, and I am afraid of * 424 injuring * it by new refinements. I should be glad, therefore,

that it should be understood, according to my present impression of the law, that there is in all voyage policies, but that there is not in any time policies, framed in the usual terms, a condition of seaworthiness implied. This rule, I believe, is adapted to the great bulk of the transactions of navigation and commerce, and when any case occurs to which it is not adapted, this may be

easily provided for by express stipulation. My observations upon this last point I offer with the greatest diffidence, after what has fallen from my noble and learned friend, for whose opinion, on all subjects within the whole range of the law of England, I entertain the most sincere respect. I am glad to think that one important question of insurance law is now finally settled.

Judgment of the Exchequer Chamber affirmed, with costs.

Lords' Journals, June 3, 1853.

1853. June 23.

DOE D. WILLIAM PADWICK, *Plaintiff in error.*
JOSEPH WITTCOMB, *Defendant in error.*

Evidence.

In an action of ejectment the question was, Whether certain lands, known as Kingston Pastures, were part of the manor of Hayling. The lands had been purchased from the Duke of Norfolk. An entry in a book found among the muniments of the Norfolk family was tendered in evidence, for the purpose of proving the affirmative of the issue. The entry, which was made by a steward of that family, spoke of an indenture which "recited a lease made by the Earl of Arundel," and which, tracing the lands into the possession of R. H., went on to say that "R. H. demiseth unto, &c. all those pasture grounds lying in Kingston, in the parish of Portsea, parcell of the manor of Hayling":—

Held, that this entry was a mere recital of some document which the writer had seen or heard of, and was not admissible either as an entry made by a person in the discharge of his duty, or as an entry against the interest of the person who made it, nor was it evidence of reputation to prove that the lands were parcel of the manor.¹

THIS was a writ of error on a judgment of the Court of Exchequer Chamber.² Padwick was the plaintiff in an action of ejectment³ brought to recover possession of a piece of land just

¹ See Sadlier v. Biggs, post 435, 446; Malcomson v. O'Dea, 10 H. L. Cas. 608.

² 6 Exch. 601.

³ There were several other actions of the same sort. See Doe d. Padwick v. Skinner, 3 Exch. 84.

outside the town, but within the parish, of Portsea, where a house had been built, of which Wittcomb had become the owner. The cause came on for trial at the spring assizes for the county of Dorset, in 1849, before Lord Denman, when it was proved that, some years ago, Padwick had purchased of the Duke of Norfolk

the island and manor of Hayling, in the county of Southhampton. * This island is surrounded by the sea, and ap-

proached on one side by a bridge from a place called Langstone, near to Havant. Padwick claimed, as Lord of the Manor of Hayling, and contended that that manor stretched into Portsea, and that certain fields once known as Kingston Pastures were included within its limits. Wittcomb's house, the subject of the action, was alleged by the plaintiff to have been built on a part of these pastures. In 1604, King James I. granted to Thomas Earl of Arundel the manor of Hayling, with other hereditaments, in fee. In the third year of the reign of Charles I. an Act was passed annexing for ever to the earldom certain lands and hereditaments, of which the manor of Hayling was one. In the 6 Geo. 4 an Act was passed enabling the Duke of Norfolk (as the successor to the Earl of Arundel of the time of Charles I.) to sell the manor to Mr. Padwick. Receipts for rent between the years 1616 and 1622, signed by "Robert Spiller," who appeared to have acted at that time as agent or steward for Lady Ann Countess Dowager of Arundel, but who had plainly been connected with the management of the property for many previous years, were put in; and, with the view of showing that Kingston Pastures were parcel of the manor of Hayling, an entry from one of his books, found among the muniments of the Norfolk family, was proposed to be read. The entry was in the following terms:—

"Tho. Stoughton, by Indenture, bearing date 14^o die Junii, Ano. 12 R. Eliz. resiting one Lease made by Henry Earle of Arundell, dated 9^o Januarii, Ano. 1^o Eliz., unto John Lo. Lumley, for 100 yeares, and one other Lease made by the said Lo. Lumley unto the said Stoughton, and one Humfrey Lloyde, declaring then the said Lloyde to be dead, and hymselfe to be sole seazed by surviver-

shipp, for and in consideration of the summe of lxxv^{ll}, paid
* 427 unto the said Lo. Lumley by Raphe Henslowe, Gent., * demiseth and graunteth unto hym all those pasture groundes lyinge in Kingston in the Pishe of Portzee, pcell. of the mannor of Haylinge, contayning 22 acres, &c. To have and to holde from

the feaste of St. Michell the Archangell, before the date thereof, for the terme of 51 yeares, Reddend p. annu., at the 2 usuall feastes xxvith viiith. A clause of distresse for the rent arere bye the space of one monethe. A reentre for not payinge by the space of 3 moneths, the same beinge lawfullye demaunded, &c. And after endorsed, signed, sealed, and deliv^{ed}, by Tho. Stoughton, Esq^r, 13 Maii, Ano. 13 Eliz., Raphen Henslowe, by deede indented, bearinge date xxii^o Aprilis, Ano. 17^o Eliz., resytinge the former Deedes, assyneth all his interest to Mr. Popiniaye, from whose widowe, by speciaall conveyance, S^r Edward Cresswell, Knight, claymeth x years, yet to come, from the Feaste of S^t Michall last.

"Entered 22 Nov. 1610."

Search had been made, but ineffectually, for the lease which was spoken of in this entry. The entry was objected to either as proof of the facts stated in it, or as evidence of reputation to prove that a place alleged to be Kingston Pastures, in Portsea, was, at the date which appeared at the foot of the entry, parcel of the manor of Hayling. Lord Denman rejected the entry on both grounds. A bill of exceptions was tendered, and the case was brought up to the Exchequer Chamber, where it was contended that the entry was admissible on both the grounds already stated ; and further, because it was an official entry of Robert Spiller, made in the discharge of his duty of steward to the Duke of Norfolk, or because it was secondary evidence of the documents referred to in it. The Court of Exchequer Chamber gave judgment overruling the bill of exceptions.¹ The present writ of error was then brought.

* *Mr. Crowder* and *Mr. Barstow* for the plaintiff in error. * 428

— The evidence here was improperly rejected. There can be no doubt that Spiller's book was kept by a man who was in the service of the Norfolk family, and it was produced from among the muniments of that family, where it had been preserved. The receipts produced and admitted in evidence show him to have acted as the steward of the Dowager Lady Arundel, and to have received the money on her account ; and she was shown by other evidence to be entitled to the rents of this property under a settlement made of it by Lord Arundel on her marriage with him.

¹ 6 Exch. 601.

The document is an original entry made by a man in the matter of his business. The first part of it is an abstract of the particulars of a lease with which it was his duty to be acquainted, as affecting the rights of the lady for whom he was acting as steward, and the word "entered" does not intimate that he was making a copy of a document; but announces the fact of his making the entry for his own guidance in the discharge of his duty. That brings it within the case of *The Duke of Newcastle v. Broxtowe*.¹ There the question was whether Nottingham Castle was within the hundred of Broxtowe, and to prove that fact certain ancient orders made by the Justices at the Quarter Sessions for the county, wherein it was so described, were held admissible as evidence of reputation, the Justices, though not proved to be residents within the county, being presumed by their office to be cognizant of the subject. It is making a distinction without a difference, to say you may give evidence of reputation as to the bounds of a manor, but not of a thing done within the manor.

[LORD BROUGHAM.—Your contention is, that in a conveyance from A. to B., a description of land as parcel of a *429 *manor would, in every other case, be evidence of reputation that it was parcel.]

This was objected to as secondary evidence, because no previous proof of the original could be given. It was not necessary to give proof of the existence of that lease for the purpose of making this entry admissible in evidence, for this entry was made by a man bound by the duty of his office to be acquainted with the matter, and making the entry in the ordinary course of the discharge of his duty.

[LORD BROUGHAM.—Without more, you say that whatever purports on the face of it to be a copy, must be taken to be a copy?]

Not quite that; but the circumstances must be looked at to determine the question. Here there could be no doubt about those circumstances. Spiller was unquestionably the steward of Lady Arundel; the entry he made must have been from an original lease; and secondary evidence of a document may be produced without the necessity, in every case, of showing the existence and the loss of that document. *Doe d. Welsh v. Langfield*,² where, in ejectment for lands which had been the subject of proceedings

¹ 4 B. & Ad. 273.

² 16 M. & W. 497.

under an enclosure Act, the entries of claims made by the commissioners' clerk in his book were admitted in evidence after his death, though no proof could be given of the existence of those claims themselves. In the same manner the counterpart of a lease has been received in evidence to prove the succession of a party, without any evidence of possession under it. In Taylor on Evidence¹ it was said that the old rule was now relaxed, and that every one agreed with the doctrine now established. *Doe d. Pateshall v. Turford*,² *Champneys v. Peck*,³ and *Marks v. Lahee*,⁴ are all authorities * to show that where a person has made * 430 an entry in the ordinary discharge of his duty, it is admissible after his death to prove the fact stated in it. It is not necessary that the entry should be adverse to the interest of the party making it, in order to render it admissible. *The Sussex Peerage Case*.⁵ The main point in this case really is this: Did this man make the entry from nothing, or was there an original lease? If there was such a lease, then this entry is fair evidence of its coming from where it does. On the face of the entry itself there is proof of its correctness, for it speaks in 1610 of the lease of 1569 having then ten years to run; and other evidence in the cause showed that there was a holding, such as this entry describes, which did end in 1620.

Mr. Butt and *Mr. Poulden*, for the defendant in error, were not called on.

THE LORD CHANCELLOR.—My Lords, this is a case in which I do not desire your Lordships to call on the other side to offer any observations, at least not until we have heard the opinion of the Judges on a question which I propose should be submitted to them. [Having stated the circumstances of the case, his Lordship proposed that the following questions should be put to the Judges]:—

“In ejectment to recover possession of Blackacre, the lessor of the plaintiff, in order to prove that Blackacre was parcel of the manor of H., purchased by him of N., having proved that from a time prior to the reign of Queen Elizabeth, and thence down to the year 1827, N. and his ancestors had been seised in fee of the manor of H., and that Blackacre was parcel of lands for-

¹ Chap. viii.

⁴ 3 Bing. N. C. 408.

² 3 B. & Ad. 890.

⁵ 11 Clark & F. 851–98.

³ 1 Starkie, N. P. 404.

* 431 merly known as *pasture lands of Kingston, offered in evidence a certain old book, found among the muniments of title of N., purporting to contain entries made by a former steward of N.'s ancestor in 1610. In the book was an entry stating that, by indenture dated the 14th of June, 12 Elizabeth, reciting a lease dated the 6th of Elizabeth, and made by the then ancestor of N. to L. for one hundred years, and another lease made by L. to S., the said S., in consideration of 75*l.* paid to L., demised to R. H. all those grounds lying in Kingston; in the parish of Portsea, parcel of the manor of H. At the foot of this entry are the words 'Entered 22d Nov. 1610.' Was this entry admissible as evidence of reputation that Blackacre, being parcel of the lands formerly known as Kingston Pastures, is parcel of the manor of H. ?"

LORD BROUHAM.—I entirely agree with the question proposed by my noble and learned friend, which seems to me a very proper form of question in this case, and which exhausts the subject.

MR. BARON ALDERSON.—Your Lordships having put this question to the Judges, I am instructed by my learned brethren to state their unanimous opinion that this book was not admissible as evidence of reputation. In order to be made so, there should first be evidence of the existence of the lease spoken of in it. Admitting the existence of a lease of the kind spoken of, we do not think that an entry of this sort is admissible, of a reputation existing at the moment such a lease was made, as to the lands mentioned in the lease. It does not appear that the entry was made on the inspection of the lease. It may have been made without any such inspection, upon information given to the steward * 432 by some * person who had no positive knowledge of the fact, or who had some interest in giving to the steward such a representation.

THE LORD CHANCELLOR.—My Lords, their Lordships feel very much obliged to the learned Judges for the very clear way in which they have given their opinion upon this point, and I now move your Lordships to concur in their opinion, and to give judgment for the defendant in error.

My Lords, this case has been stated in the way which used to

be the form in cases in which this House took the opinion of the Judges, but which has not been adopted lately. Here it was necessary to resort to the old form of putting a question, for otherwise it would have been necessary to state the whole record, which would have involved the case in unnecessary complication and difficulty.

The answer to the questions stated by the learned Judges has stripped it of all difficulty whatever. I assume that the book was a book coming from the muniments of the Duke of Norfolk ; that it had been written by, or signed by his steward, in the end of the reign of Queen Elizabeth, or the beginning of the reign of James I. If that was so, and the entry had been an entry of something which he did in the discharge of his duty, it might very well be received as evidence of the truth of what it purported to describe. So, if it could have been made in any way analogous to the counterpart of a lease, something like an admission against the interest of the party who made it, it might have been admissible. But this is not an entry of that kind. This is an entry officially made by the steward,— if it was made at all by him. It was not an entry of any thing he did in the discharge of his duty. It is an entry relating to what he there states to have been done by

* some of the under-tenants of the then owner of the manor, * 433 in transactions *inter se*, not transactions between him and them. It might be a very convenient piece of information for a steward of the lord who had demised, as the case states, to A., that is to say, to Lord Lumley, for one hundred years, to know what those claiming under him had been doing with the property. But what dealings Lord Lumley had with persons under him, was a matter not within the province of the steward of the Duke of Norfolk to enter upon, and this entry, therefore, can afford no evidence, either on the ground of its being an entry made by him in discharge of his duty, or as proof of reputation of the fact which he purports to record.

Under these circumstances, I confess I think there can be no doubt whatever that the learned Judge was quite justified in rejecting the evidence. And I come to that conclusion, having considered the case very attentively, from the consciousness that it was impossible not to feel that the plaintiff in error laboured under very great difficulties, having had the opinion of all the Courts against him, and having myself been one of those who

had in a former stage of this business expressed the opinion to which I now move your Lordships to assent. I have listened to the argument with perfect candour, and if I could have been convinced to the contrary, I should have been ready to be so convinced. But my opinion is unchanged, and I must add that I do not think it is a case in which the House has any reason to regret that the rules of law compel us to this conclusion, because any thing more dangerous or more to be deprecated than that parties should look up old entries in the reign of Elizabeth or James I., for the purpose of disturbing, by such evidence alone, the state of things which has prevailed from that time to the reign of * 434 Queen Victoria, can hardly be imagined. I therefore * move that judgment be given for the defendant in error.

LORD BROUHAM.—I entirely agree with what has fallen from my noble and learned friend. I will only add that this, which appears to be a memorandum made by a steward — we will take him to have been a steward — of the Duke of Norfolk, is no evidence to show that these lands were parcel of the manor of Hayling. The question in this action being parcel or no parcel of a manor, it is not sufficient evidence of reputation that the lands are mentioned in an entry as having been the subject of a demise in some lease under that description.

It was ordered, that the judgment of the Exchequer Chamber, affirming a judgment of the Court of Exchequer for the defendant in error, should be affirmed, with costs.

Lords' Journals, 22d June, 1853.

* SADLIER v. BIGGS.

*435

1853. July 1, 4, 5.

THOMAS SADLIER the elder and another, *Appellants.*
SAMUEL DICKSON BIGGS, *Respondent.*

Leases. Renewals. Registered Memorial of Deed. Evidence.

S., on the 5th January, 1746, being tenant in fee simple of lands in Tipperary, executed an indenture, which was, two days afterwards, registered under the Irish Registration Acts. The memorial represented that S. had, by the indenture, demised, or agreed to demise, these lands to C. for three lives, therein named, with "a clause of renewal after the expiration of said lives thereinbefore mentioned," provided that C., his heirs, &c. should, "within six months from the death of the last of said three lives, nominate such life or lives as he would have inserted," and pay all rent, and "the sum of 11*l.* 7*s.* 6*d.* for adding or renewing such life or lives for ever." The memorial was signed by C. alone, and he registered it. In February, 1750, S. executed a settlement in contemplation of marriage, by which he made himself tenant for life only in the estate comprised in the indenture of 1746. In March, 1750, he executed a lease to C., in which the indenture of 1746 was recited, and in consequence of some changes in the lands a change was made in the rent. The lease recited the indenture as a demise to C. for three lives and the longest liver of them, with a covenant to "renew the same for ever on payment of 11*l.* 7*s.* 6*d.* for renewing the same on the fall of every life, within six months next after the fall of each life." The *habendum* in the lease was for the same three lives; and S. covenanted that, "upon the death or failure of the aforesaid life or lives, or any or either of them" (naming them), and upon C., his heirs, &c. paying "the sum of 11*l.* 7*s.* 6*d.* above the annual rent, within the space of six calendar months, and immediately after the death or failure of such life," and on nomination, &c., "S. and his heirs," &c. would add the life so nominated; "and so in like manner from time to time successively for ever thereafter on the failure of every other several life or lives in the said lease or thereafter to be nominated." Renewals had, from time to time, been made by the successors of S. in the estate, sometimes after proceedings in Chancery to compel the same, sometimes without such proceedings; but in 1845, G., the descendant of S., having absolutely refused to renew, a Bill was filed against him by B., who had become * possessed of C.'s lease. The Bill *436 prayed for a renewal according to the lease, which B. alleged to have been made in conformity with, and under the obligation of, the indenture of 1746. This indenture could not be produced, but the memorial was tendered and received in evidence. The defendant alleged that the lease was ineffectual to bind the inheritance, as it was made by a person who was, at the moment of executing it, only tenant for life, and he contended that there was no legal evidence of the indenture of 1746. He also relied on the difference be-

tween the terms of renewal contained in the indenture and those contained in the lease :—

Held, affirming the judgment of the Court below, that the plaintiff was entitled to the renewal as prayed ; that the memorial was properly admitted as secondary evidence of the indenture ; that that indenture was to be treated as an original lease, containing a covenant, under the obligation of which the lease of 1750 was executed ; that the obligation entered into in 1746 being by the tenant in fee simple, his performance of it in 1750 was valid, although he was then only tenant for life ; and that the acts of the successive tenants of the estate, though not evidence to prove the existence of the covenant, became, when the covenant had been otherwise proved, evidence of the construction which the parties interested had put upon it.

Upon one of the occasions of renewal, the tenant for life against whom a Bill had been filed was an infant. The Court of Chancery in Ireland ordered his guardian to execute a lease in conformity with the covenant contained in the deed of January, 1746 :—

Per Lord St. Leonards, that order was authorised by the Irish Statute 11 Anne, c. 3.

THIS was an appeal against a decree of the Court of Chancery in Ireland, made in a suit which was originally instituted in the Court of Exchequer in equity there, and which was afterwards, under the provisions of the 13 & 14 Vict. c. 51, transferred to the Court of Chancery.

The respondent, in 1845, filed a bill, which was afterwards amended, and to which the younger of the appellants was * 437 then added as a party, against the appellants, in order * to compel them to grant a renewal of a lease of certain lands held by the respondent under them, according to the covenants and conditions contained in a lease originally granted on the 2d of March, 1750. The bill, as amended, stated that Charles Sadlier was seised, as in fee, of certain lands called Bellevue, &c., and, by certain indented articles, bearing date the 5th day of January, 1746, and made between the said Charles Sadlier of the one part, and John Chawner, of Ballyguider, in the said county, of the other part, Charles Sadlier demised, or agreed to demise, to John Chawner, his heirs, &c. the towns, lands, and premises described in and demised by the indenture of lease next mentioned, for and during the lives and life of John Chawner, Daniel Alt, and Joseph Palmer, and the survivor of them, at the yearly rent of 92*l.* 10*s.*, payable as therein mentioned, and in which said articles was contained a covenant for the perpetual renewal thereof.

That the respondent has not in his possession or power the said

articles, but believes same have been long since lost or destroyed, but a memorial thereof, duly perfected by said John Chawner,¹ was duly registered, in the proper office for registering deeds in Ireland, on the 7th day of January, 1746, and which said articles are stated in said memorial to contain "a clause of renewal, after the expiration of said lives thereinbefore mentioned, provided said Chawner, his heirs, executors, administrators, and assigns, should, within six calendar months, to be computed from the death of the last of the said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as well all rent and arrears that should be due for the half year after the fall of such life, as the sum of 11*l.*

7*s.* 6*d.* for adding or * renewing such life or lives for ever," * 438 as by the said original articles, or a counterpart thereof, in the possession of the defendant, Thomas Sadlier, had the plaintiff the same to produce, or by the said memorial, or an attested copy thereof, when produced and proved, will more fully and at large appear.

The bill then alleged that, by lease and release dated 2d March, 1750, between the said Charles Sadlier of the one part, and the said John Chawner of the other part, after reciting a lease by Sadlier's father, dated 1st October, 1724, to John Chawner and Daniel Alt, and a lease from Colonel Thomas Butler, and that by the death of Sadlier's father, the fee simple and inheritance of said lands descended to said Charles Sadlier, party thereto, and his heirs, and that said Charles Sadlier, party thereto, by the articles of January, 1746, had demised to said John Chawner and his heirs certain lands therein described, to hold the aforesaid towns, lands, &c. for and during the three lives therein named, and the longest liver of them, at the yearly rent of 92*l.* 10*s.*, with a covenant to renew the same for ever, on payment of 11*l.* 7*s.* 6*d.* for renewing the same on the fall of every life within six months next after the fall of each life, and it was by the said indenture witnessed, that the said Charles Sadlier, party thereto, in pursuance of said indented articles, and for the considerations therein mentioned, demised, &c. unto the said John Chawner, his heirs and assigns, All that, &c., excepting thereout unto Charles Sadlier, his heirs, &c., all mines, &c., and also full and free liberty to hunt, hawk, fish,

¹ Chawner's name alone was signed to the memorial. His signature was duly attested by two witnesses.

CASES IN THE HOUSE OF LORDS.

To have and to hold all and singular the said demises with their appurtenances (except as before excepted) to the said John Chawner, his heirs and assigns, from the first day of November then last past, for and during the life of the said John Chawner, Daniel Alt, * and Joseph Palmer, and the survivors and survivor of them, and for the natural lives and life of all and every such other persons as by virtue of the clauses and covenants for hereinafter contained, should, from time to time for ever thereafter be added to said demise, to the said John Chawner, his heirs, and assigns, yielding and paying thereout unto the said Charles Sadlier, his heirs yearly rent or sum of 90*l.* 8*s.*,¹ then current, &c. ; and Charles Sadlier did thereby, his heirs and assigns, covenant, promise, and agree, to the said John Chawner, his heirs and assigns, that upon the death of the aforesaid life or lives of the said John Chawner, and Joseph Palmer, or any or either of them, to the said Charles Sadlier, his heirs or assigns, first paying unto the said Charles Sadlier, his heirs or assigns, 7*s.* 6*d.*, then currency, over and above the sum before reserved, within the space of six calendar months immediately after the death and failure of the person so happening first to die, or nomination of the life of any other person owner, his heirs or assigns, within the said six months, to the said Charles Sadlier, his heirs or assigns, to be put in the place and stead of the person so happening first to die, then the said Charles Sadlier, his heirs or assigns, shall, within the said six calendar months from the death of the person so happening first to die as aforesaid, add to the term of said lease the life of such person so happening first to die as aforesaid, declaring the life so added to be part of the life so falling * to be, with the life and being, the three lives during which the said lease is to continue, and so in like manner from time to time for ever thereafter, on the failure of every life in said lease then nominated or theretofore by agreement, Sadlier having but his interest in the same.

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after to be successively nominated as aforesaid, and upon the like payment of the sum of 11*l.* 7*s.* 6*d.*, then currency, and upon the like nomination of any other life successively to be added in lieu of every several life so failing as aforesaid, within the space of six calendar months as aforesaid, that the said Charles Sadlier, his heirs or assigns, should, and would, within the said six months next after the failure of every other such several life, so to be nominated as aforesaid, add and insert to the term of said lease, from time to time for ever, the several life or lives of such person or persons to be nominated in the place and stead of the life or lives of the several person or persons so successively happening to die, as aforesaid, and which indenture of demise was duly registered in the proper office for registering deeds in Ireland, as by the said indenture, now in plaintiff's possession, ready to be produced and proved, will more fully and at large appear.

It appeared by the statements in the bill and answer, and by the evidence in the cause, that on the 1st of February, 1750, Charles Sadlier executed a settlement in contemplation of marriage, by which the fee was vested in other persons for the purposes of the intended marriage, and he became only tenant for life in the reversion. This deed was registered on the 10th of June, 1750. The marriage settlement itself was executed on the 5th June, 1751. The lease which had been executed by C. Sadlier to Chawner, in March, 1750, was not registered till the 1st of August, 1752.

Charles Sadlier died in 1756, and the estate then vested * in his son Thomas Sadlier, an infant, and Chawner's interest having been transferred to Benjamin Biggs, and a life having dropped, Biggs, upon the 8th of February, 1766, exhibited his petition to the Court of Chancery against Thomas Sadlier, the infant, and the Rev. Ralph Grattan his guardian, praying to be declared entitled to a renewal. An order for renewal was made on this petition, and the renewal was ordered to be executed by the guardian of the infant on the infant's behalf, and a lease was duly executed by the guardian in 1770, in compliance with that order. The interest of Benjamin Biggs afterwards became vested in George Biggs, and another life having dropped, he, in 1779, filed his bill against Thomas Sadlier, who had in the mean time attained his full age, praying for a renewal. The claim was at first resisted, but T. Sadlier, on the 6th of

March, 1782, submitted to execute a renewal, and this renewed lease was made for the life and lives of three persons therein named, and the survivor of them, and contained a covenant by T. Sadlier for the perpetual renewal thereof. Other renewals took place on the 21st November, 1797, and the 28th May, 1814. This last renewal was executed by the father of the elder appellant to the father of the respondent. On the 30th of April, 1844, the appellant served on the respondent's elder brother (then the tenant in possession) a notice to quit the premises included in the lease of 1750 ; and on the 22d of August, 1844, the respondent, who had then come into possession, served on the appellant a notice to execute a renewal of that lease, by substituting a life in the place of that of the respondent's father, deceased, and tendered the rent up to the last rent-day, and also the renewal fine. The renewal was not executed, and on the 4th of June, 1845, the respondent

filed his bill in the Court of Equity Exchequer in Ireland

* 442 against the appellant, and thereby * prayed that the appellant might be decreed to execute a renewal, pursuant to the covenant contained in the original lease.

The appellant, in August, 1845, put in an answer, relying on the certain grounds of defence which were afterwards, with others, included in his answer to the respondent's amended bill. One of these grounds of defence was, that his eldest son, Thomas Sadlier the younger, was the first tenant in tail, in reversion, to the lands expectant on his, the life estate of the appellant.

The respondent filed an amended bill in May, 1846, by which he made Thomas Sadlier the younger a party defendant as first tenant in tail of the reversion. He also put in issue the articles of the 5th January, 1746, alleging their loss, and relying on the memorial thereof, executed by Chawner, and duly registered on the 7th January, 1746, in which memorial an abstract of the alleged covenant for perpetual renewal, as contained in the articles of the 5th January, 1746, was set forth. The respondent, in the said amended bill, also put in issue an action of ejectment brought in Michaelmas Term, 1844, in which action the respondent had given consent for a judgment, under the belief that the renewal of May, 1814, which had been executed by a tenant for life only, afforded no effectual defence at law against the legal title of Thomas Sadlier the elder. The amended bill prayed that the respondent might be declared entitled to a renewal of the lease of the

2d March, 1750, pursuant to the covenant contained in the articles of the 5th January, 1746, and in the said lease itself.

The appellants, by the answer to the amended bill, relied on additional grounds of defence: first, they denied that the articles of the 5th January, 1746, had ever existed, or if they had, contended that upon the true construction of such *articles * 443 they did not contain any covenant for perpetual renewal, and admitting that a memorial to the effect stated in the bill existed in the office for registration of deeds in Ireland, the appellants relied as an objection against such memorial being received in evidence against him, that it never had been executed by Charles Sadlier the covenantor; and that the affidavit as to the execution of the alleged articles and memorial was made by Henry Chawner, the son of John Chawner, and who had a direct interest in sustaining the alleged articles; secondly, that as the memorial was not executed by Charles Sadlier, and as the possession of the demised premises by John Chawner, and those claiming under him, was capable of being explained under and as referable to the lease of the 2d March, 1750, independently of the alleged articles, that the memorial afforded no sufficient evidence of the existence and contents of such alleged articles against the appellant, claiming under the marriage settlement of the 1st February, 1750, by which, and before the execution of the lease, Charles Sadlier had become tenant for life only, in the reversion; thirdly, that even supposing the memorial to be admissible against appellants as evidence of the existence and contents of such alleged articles, yet the clause or covenant for renewal contained in it was not a covenant for perpetual renewal, but was a special covenant for a single renewal only, after the death of all the lives in the alleged articles named, that the clause was not sufficiently certain as to the terms of any renewal, except a single renewal, or as to the amount of the fine to be paid on any further renewal, or whether a fine was to be paid on the further renewal of each new life, or for three new lives; also that all the lessors in the subsequent renewals were, by virtue of marriage settlements under which appellants claimed, tenants for life only, without any power of leasing * beyond * 444 a limited period, and therefore that they were not bound by the admissions or statements made by any of these parties, or by the execution by those parties of the several renewals.

The cause was fully heard, and evidence received on both sides.

The appellants objected to the memorial of 1746 being received in evidence on the ground set forth in the answer to the amended bill. The objection was overruled, and the memorial admitted in evidence. On the 15th of November, 1847, a decree was made¹ declaring the respondent entitled to a specific execution of the articles of the 5th January, 1746, and to a renewal of the lease of the lands comprised in the said articles, at the yearly rent of 90*l.* 8*s.*, and a renewal fine of 11*l.* 7*s.* 6*d.* on the fall of each life, and so *toties quoties* for ever on the fall of any one life. And it was referred to the Remembrancer to settle the form of a renewal, and to ascertain what lands were included therein. This last direction was occasioned by a question whether certain lands called Gurtmunga were a sub-denomination of the lands of Bellevue, or were so reputed at the time of the execution of the articles in January, 1746. On the 4th June, 1850, the Chief Remembrancer made his report, stating the amount due for rent and fines, and declaring Gurtmunga to be part of the lands included in the articles. On the 11th June, the appellants filed exceptions to the report, and the equity jurisdiction of the Court of Exchequer in Ireland having been in the mean time, by the provisions of the Act 13 & 14 Vict. c. 51, transferred to the Court of Chancery there, the exceptions came on to be heard in that Court, and by an order, dated 5th February, 1851, the exceptions were overruled. It was this order that was appealed against.

* 445 * *Mr. Roundell Palmer* and *Mr. Bovill* for the appellants.

— The respondent's case now rests on the articles of January, 1746. But there is no evidence of those articles except in the memorial. That memorial is not admissible in evidence; but if it was, it would not sustain the respondent's case, for it does not contain terms consistent with a claim for a perpetual renewal. Assuming it, however, to be evidence, the rule that such a covenant "must be clear, plain, and distinct, and in terms that will not bear any other construction,"² must be applied. Applying that rule to the construction of the articles here, the only words which are said to constitute the covenant for perpetual renewal are the words "for ever." But if the whole of the deed is looked at, it is clear that those words only refer to the three lives on

¹ 10 Irish Eq. 522.

² Per Lord Brougham, *Brown v. Tighe*, 2 Clark & F. 396, 416.

which the lease of 1750 is granted. The words are, "the lives before mentioned," and those lives are the lives specifically mentioned in the deed. The renewal, therefore, related only to a renewal after the expiration of those three lives, and not at any future time. So that even if the memorial should be held to be admissible in evidence, it will not, on a fair construction of its terms, support the claim here made.

But this memorial was not admissible in evidence. It is objectionable, first, because it is only signed by one of the parties to the deed supposed to be registered. A registered memorial can only be evidence against those who registered it, or those who claim under them: *Doe v. Clifford*,¹ *Wollaston v. Hakewill*,² and here the lessee alone had executed the deed, and he alone registered it. To allow a different rule would be to create great opportunities * for fraud. *Scully v. Scully*³ is not a clear authority the other way. There the circumstances were peculiar. The covenant was made on marriage, and the marriage having taken place, the consideration for the covenant was completely executed. Besides which, the question there was, not whether the articles existed or not, but whether the wife had not taken under the will a benefit in satisfaction of those articles. In like manner, in *Peyton v. M'Dermott*,⁴ the possession of the property had gone with the articles, the memorial of which was admitted in evidence. That is not the case here. It is submitted, therefore, that the mere registration of an instrument cannot render the memorial admissible in evidence unless the existence of that instrument can be legally proved, and especially that the registration of an instrument cannot make it evidence for the party who alone has signed it. It is not a declaration against his interest, but in support of his interest. The registry could only be evidence of the date at which it took place, not of the contents of the instrument. The memorial might show that such a document had existed; but certainly could not show any more. The principle adopted in *The Queen v. Bliss*,⁵ and in *Daniel v. North*,⁶ and by this House in *Doe d. Padwick v. Wittcomb*,⁷ would exclude this memorial, for the memorial is not executed by any one who

¹ 2 Car. & K. 448.

⁴ 7 A. & E. 550.

² 3 Man. & G. 297, 3 Scott, N. R. 593.

⁵ 11 East, 372.

³ 10 Irish Eq. 557.

⁶ Ante, p. 425.

⁴ 1 Drury & Walsh, 198.

had authority, or was bound by duty to make the declarations it contained.

[**LORD ST. LEONARDS.** — Suppose the loss of an original deed proved, as the original must be produced and indorsed at the time of registration, the question would be, whether the register would not be evidence of the contents of the original deed, unless * 447 it was shown by other means that * there was a discrepancy between them, especially if it was found that parties had been acting for upwards of a century in obedience to the provisions of the supposed instrument.]

It would be impossible to resist the force of the question thus put except in a case like the present, where the discrepancy is clearly shown by the fact that the memorial, and the lease, supposed to be made in accordance with the indenture, of which the memorial is the register, disagree with each other. One provides for a fine payable on each life, the other on the last of three lives. If they had agreed together, it might have been an argument in favour of letting in the memorial, especially if the acts of the parties had been in accordance with it. That is not so here, and the memorial is not admissible. Under these circumstances, too, the subsequent dealings of the parties are of no value. They cannot bind any one by their own proper force, or as the acts of parties interested, for they are the acts in each instance of mere tenants for life, who could not bind the inheritance, and who received an immediate benefit in the fines paid, which fines were in diminution of the profit to the inheritance. This case, therefore, does not fall within *Cooke v. Booth*,¹ even if that decision had never been doubted ; but comes within the principles laid down in the case of *Baynham v. Guy's Hospital*,² where it was expressly decided that a legal instrument is not to be construed by the acts of the parties. The same rule was held in *Iggulden v. May*,³ and in *Nangle v. Smith*.⁴ Lord Plunkett in the course of the argument there said, “ Whether seised in fee or not, their acts could not construe the covenant.”

The law is opposed to binding the inheritor of property * 448 * by the covenants of his ancestor, except where there are clear words to create the obligation, for it leans against a construction for perpetual renewal unless clearly intended. *Bayn-*

¹ Cowp. 819.

² 8 Ves. 295.

³ 9 Ves. 325.

⁴ 1 Irish Eq. 119.

ham v. Guy's Hospital, and *Iggulden v. May*. *Harnett v. Yielding*¹ is to the same effect. The words "for ever" in this instrument are really disconnected from the covenant for renewal, and are senseless, or else they meant that so long as the grantor lives he will renew, on the conditions therein stated. In *Kenny v. Ford*,² there was a covenant in which the words were very strong; but the Court held that they did not amount to a covenant for perpetual renewal, and refused to permit a prior lease to be resorted to for the purpose of expounding the covenant. That case, and *Brown v. Tighe*,³ and *Smyth v. Nangle*,⁴ show that even in Ireland the leaning of the law is against perpetual renewal. Here the words do not amount to a covenant to renew, but to a covenant that, so often as the lease shall be renewed, the lessee shall pay. If the construction here is that there is to be a renewal for ever, by reason of the words at the end of the clause, then it is clear that there are mutual rights of lessor and lessee. But then the former cannot, according to the pretended articles of 1746, as set forth in the memorial, claim a fine till all the three lives have fallen, and then he can only claim one fine. Yet such was not deemed by the parties who executed the original articles to be their true meaning, for in 1750, only four years after the execution of the articles, all the same parties being still alive, a new lease was executed, with the same lives in it, though it differed from the articles of 1746 in many important respects; and this new lease was, besides, perfectly unnecessary, if the parties claiming as lessees were already in possession * by virtue of *449 a valid lease of 1746. This is a fact which shows beyond all doubt that the interest, whatever it was, which had been created by the articles of 1746, had then ceased. If so, then the whole claim of the present respondent rests upon the lease of 1750. That gives rise to another objection. If the respondent's claim rests on the lease of 1750, then the decree of the Court below cannot be affirmed; for that is a decree for specific execution, not of the lease of 1750, but of the articles of 1746.

Now that lease was invalid, so far as any covenant for renewal was concerned; for before its execution Charles Sadlier had executed a marriage settlement, by which he had parted with his interest in the fee, and had become merely tenant for life of the

¹ 2 Sch. & L. 549.

² Batty, 534.

³ 2 Clark & F. 396.

⁴ 7 Clark & F. 405.

estate. He had not, therefore, any power to make a lease with a covenant for perpetual renewal ; he could not bind the inheritance, and his covenant to do so, even if it should receive the construction contended for on the other side, cannot be enforced.

The lease made by Thomas Sadlier, in 1782, is equally without force as a valid instrument ; for in 1773 he had executed a settlement, in contemplation of marriage, by which he had made himself only tenant for life of these lands, and had ceased to possess any power to bind the inheritance. The same thing appears to have occurred in several other instances ; and the successive owners of the lands having been only tenants for life, they were incapable of making any valid renewal of a lease of this kind.

The Solicitor-General (Sir R. Bethell) and Mr. Glasse, for the respondents, were not called on.

THE LORD CHANCELLOR. — In this case your Lordships have heard from the counsel on behalf of the appellants a statement of the grounds upon which they rest their case ; and after

* 450 listening to their arguments, * I am prepared to advise your Lordships that it is not necessary to call upon the respondents, because it appears to me that their case is established beyond all reasonable doubt, and that nothing which has been urged upon the part of the appellants has at all tended to induce the opinion that the decree pronounced below is in any respect erroneous.

[His Lordship here stated very fully the circumstances of the case.]

The case, therefore, is, that there has been for now more than a century a continued line of renewals, from time to time, since 1750, and the respondent seeks to have a renewal now decreed in his favour, and a decree to that effect has been made by the Court of Chancery in Ireland.

In order to show that the plaintiff was not entitled to have that renewal, the case relied upon by the appellant is this : he says that at the time of the original lease (that which I have treated as such), the lease of the 2d March, 1750, Charles Sadlier, who made it, and entered into the covenant for perpetual renewal therein contained, was not the owner of the fee simple, and therefore not capable of binding the parties who succeeded afterwards

to the property ; that he was in truth only tenant for life ; and that fact was sought to be established by showing that a month before the execution of that lease, namely, on the 1st February, 1750, Charles Sadlier had made a marriage settlement, whereby he had settled, *inter alia*, the lands in question upon himself for life, with remainder to his first and other sons in tail, so that being only tenant for life, he could not enter into any valid covenant which should bind the remainder-man or affect the inheritance. The appellant further contends that that has been the sort of estate existing all along, that no person who has executed any one of these renewals had any power so to do.

* My Lords, that case is met in this way. True it is that *451 Charles Sadlier, at the execution of the lease of 1750, was only tenant for life ; but still he was not inaccurately described, as between himself and the lessee, as being the party having the fee simple ; because, up to within a month before the time of his executing the lease he had been seised in fee, and four years previously he had bound himself by what may perhaps be designated as a lease (but which seems to have been treated as an imperfect lease, because it contained a covenant that the parties would make a perfect lease afterwards), to grant the lease in question, so that although he was legally, in March, 1750, only tenant for life, still he was tenant for life subject to a right on the part of the lessee by an obligation, entered into before he parted with the fee simple, to make a perfect and a renewable lease. The question is, whether that is made out to be the case or not ? If it is, there is an end of the appeal. It appears to me to be abundantly shown that that is perfectly and satisfactorily made out. The lease of the 2d March, 1750, appears as a lease between Charles Sadlier of the one part, and John Chawner of the other part, and the former demises to the latter, reciting the articles of agreement of 1746, with a clear covenant for renewal. [His Lordship read it.]

Now that is a covenant made by a party who is truly said to have been at the time only tenant for life ; but he there says he made it pursuant to an obligation under which he had come by virtue of the previous agreement. Is that or not made out to be true ? In order to show that it is true, I will not, in the first instance, look backward to what evidence there is *ab ante* of the existence of that prior instrument ; but I will, by the most legiti-

mate mode of reasoning, go down to a future time, and see whether what the parties have been doing during the last *452 century, for I * may call it so, is or not consistent with any other hypothesis than that there was an obligation upon Charles Sadlier to make the lease in question.

What is the first thing that we see took place after this instrument of 1750 ? Charles Sadlier, the party to the deed of 1750, died in 1756. Two of the lives fell in about the beginning of the year 1769, at the time Thomas Sadlier, who was tenant in tail, then in possession, was still an infant. An application was made to the Court of Chancery in Ireland to compel him or his guardian to execute a renewal of the lease. That could only have been upon the footing that for some reason or other the covenant bound him. Now the covenant did not bind him if it was only a covenant made by his father as tenant for life ; but it did bind him if the covenant was, as it represents itself upon the face of the instrument, a covenant which he was bound to enter into by reason of a prior obligation contracted by him when he was tenant in fee simple. It is plain that the view taken by the Court of Chancery in Ireland was, that he was bound by that obligation, because the Court ordered the guardian to execute a renewal. Some time before the year 1782, another life dropped, namely, the life of Daniel Alt. Now, what were the rights of the parties then, supposing nothing except that renewal to have happened between 1750 and 1782 ? Supposing nothing else had happened, we have Thomas Sadlier (who had then arrived at his full age), the son of Charles Sadlier, being the absolute owner, for so I must call him, of the property, since he was tenant in tail in possession, applied to that he might execute a new lease in pursuance of his father's covenant, and proceedings were instituted to compel him to do so. It does not appear that those proceedings ended by a decree ; but,

*453 as far as the tenant was concerned, they ended in that which was just as good to him as any decree, * namely, in the fact that Sadlier was advised to acquiesce, and, being tenant in tail, he executed a lease pursuant to his father's covenant, reciting it and treating it as a valid covenant, and as one which bound him.

My Lords, I have said he was tenant in tail in possession. Now I am aware of the argument which was pressed upon your Lordships, that he was not really tenant in tail in possession, because

he had, in the mean time, dealt with the property by entering into marriage articles in 1773, so as to make his position no longer that of a tenant in tail in possession. He had, as it appears, executed articles before his marriage, in the sense that he had signed some paper; but he was an infant at the time, for you find in the proceeding instituted against him previously to his granting the lease of 1782, a bill being filed against him, that he by his answer admits that he attained his age of twenty-one years in the year 1774. Now the articles are dated in the year 1778; he was therefore a minor at that time, and no articles could bind him as to his inheritance at all. He was therefore legally tenant in tail subsequently to that obligation, so far as it was an obligation. He had bound himself upon his marriage, by certain articles, to make a settlement of the property under which he would no longer have been tenant in tail; but even if the articles had been executed by him after he had attained his age of twenty-one years, I do not see how they could have affected the case. We have no evidence of what these articles were, except from the memorial of them. I do not stop to inquire whether that is legitimate evidence upon the subject or not; I will assume it to be legitimate. We have a memorial of these articles, which was put upon the register shortly after the execution; and all that appears upon the memorial is, that he had by the articles stipulated to secure a jointure to his wife, and created a trust term of two hundred years, I do not know *for what reason, unless, as it appears afterwards, for the securing a portion to his younger children. *454

But all the evidence we have of any articles of agreement, is of articles which do not affect the ultimate right of the tenant in tail. It appears to be perfectly clear that, being tenant in tail, he executed a renewal lease in 1782 to the holder of the existing lease, Benjamin Biggs; doing so by a recital which states his obligation to do it by reason of that which had been stated as the obligation in the two preceding instruments, namely, the deed which had been executed by Charles Sadlier.

He was at this time, certainly, only tenant in tail; but it appears by the evidence that, in the year 1795, upon the coming of age of his eldest son, or some time after his eldest son had come of age, he made a settlement of the property, with the concurrence of his eldest son, and in order to give complete effect to that settlement he covenanted to levy, and afterwards did levy, a fine, and suffered

a recovery to ensue to the uses of that settlement; but saving and confirming, in words, all the previous leases made by parties who had perfect power by their settlements to make them. There was, therefore, express confirmation of this lease; but I think that, independently of that, it is quite clear, upon ordinary principles, that the lease was binding. A party being tenant in tail, and making a lease for a valuable consideration, and afterwards levying a fine, and suffering a recovery, would by these acts do that which would enure to confirm that lease, even if there had not been these words. But those words appear to me to put it beyond all doubt that it was his intention to confirm it as far as he was able so to do. That is the way in which it stands. The original lease was again renewed in 1814. The result is, that throughout all this long period of time, about a century, the parties have been all dealing upon the footing that one was entitled to claim,

* 455 and * the other was bound to grant, renewals of leases

which, if the contention now insisted upon by these appellants was well founded, might always have been successfully resisted by the party that was required to grant the lease. It was evidently much to the interest of every one of these parties to do so; because I see by the different instruments given in evidence, the sort of consideration that was paid from time to time; there was one case in which 5000*l.* were paid for the leasehold interest, so that the sum of 11*l.* 7*s.* 6*d.* is wholly absurd as being the value, or any thing like the value of a renewal, and the renewal can be accounted for upon no other ground but that of its being made under the force of the obligation. It appears to me that there are the most satisfactory circumstances tending to show what the rights of the parties are: there are, long enjoyment, the same dealing with the property for a very great period, during the whole of which it was the interest of one party to resist that which, nevertheless, he from time to time performed.

It is argued that there is no evidence that we can look at as proof of the prior instrument relied on by the respondent. Although referred to and memorialled, it is said not to be, because of certain technical reasons, or substantive reasons, if you please, admissible in evidence. Why not? The covenant in the deed of 1750 is perfectly sufficient evidence of it, if it is true. Now, in order to see whether it is true or not, I have already looked through all the subsequent transactions; but if that is not suffi-

cient, may I not look at all the circumstances attending the execution of the covenant, and see whether, conjointly with that or preceding it, there were not circumstances tending to prove the truth of that statement, that he was bound by the prior covenant? I am clearly of opinion that I am so entitled, and if I am entitled to look at every thing which enters into the statement of the circumstances, I ask, was the statement contained in * the * 456 deed of 1750 true? If it was true, what would you expect to find? Why, you certainly would find upon the register a memorial of that old deed, signed, not by Charles Sadlier, the lessor, but by Chawner, the lessee, it being invariably the lessee or the purchaser who in such cases registers the memorial, and not the party from whom the estate has passed. If that is so, it brings us back by the most legitimate course to the memorial. Let us then see what that memorial contains.

And this brings us to the second point insisted on upon the part of the appellant. It is said when you look at the memorial of the original instrument, the alleged foundation of the subsequent deed in 1750, you do not find in this memorial such a covenant as the deed of 1750 represented as being made; I think there are two perfectly sufficient and satisfactory answers to that. In the first place, I do not see any substantive difference between the two. I take it that the memorial is a literal copy of the instrument of which it purports to be a memorial. What is it? It is a lease. The parties treat it as an agreement for a lease, the yearly rent payable so and so, with a clause of renewal after the expiration of such lives, provided Chawner, then the lessee, his heirs, executors, administrators, or assigns, should, "within six calendar months, to be computed from the death of the last of the said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as well all rent and arrears that should be due for the half year after the fall of such life, as the sum of 11l. 7s. 6d., for renewing or adding such life or lives for ever." I read "for ever," coupling it with "of renewal," thus: "of renewal" (put all the rest in a parenthesis) "for ever." That is the only meaning of the parties,— there is no other; the terms are to renew it for ever. There is indeed a discrepancy between * the me- * 457 morial and the lease, for the memorial appears to state that there was to be no renewal till after the first batch of lives — all

the first three — had expired. The parties might stipulate that the renewal should take place upon these terms, namely, no renewal till after the first three lives, and then a renewal upon the falling of every life afterwards ; it might be so, but I do not believe that was the meaning. If it was, however, that is immaterial now ; it only shows that at the first renewal, when only two lives had fallen in, the parties were renewing when they were not bound to renew, but that does not interfere with what happened afterwards, when, under the terms of this deed and the covenant in the lease of 1750, the parties were from time to time parties to fresh renewals. Therefore it appears to me, for all practical purposes, that there is no substantial, or indeed any, difference whatever between the covenant stated in the memorial, and the covenant stated in the deed of 1750.

But I think there is another perfectly satisfactory answer to this part of the case, namely, that if there is a discrepancy, and I must choose between the two deeds, the parties have enabled me by their own acts to make the proper choice. They have been acting upon the covenant as if the covenant, as represented in the deed of 1750, was a correct covenant. Is that so ? Suppose for a moment that there is a difference. I say there is none ; but if there is, it is perfectly competent for me to say that I believe that is the covenant and not the other. Mr. Roundell Palmer, in arguing this case, supposed that by so doing we should be violating the rule, which is a perfectly well-established rule, and consistent with very good sense, and which was established in the case of *Bayn-*

* 458 *ham v. Guy's Hospital*,¹ overruling the case * which was sent by Lord Bathurst for the opinion of the Court of Queen's Bench,² namely, that you cannot construe a deed by the acts of the parties. Certainly not, that is to say, if there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it. But what is this instrument here ? It is a memorial that is in the nature of an abstract, or a representation of the parties of what the covenant was, and when I see what the effect of it is represented to be in the deed of 1750, four years afterwards, and find that that representation has always since been acted upon, the inference I arrive at in point of fact is, that it is not correctly represented in

¹ 3 Ves. 295.

² Cooke v. Booth, C. & P. 819.

the memorial, but has been more accurately stated in the deed of 1750, when the parties were to act upon it, and it has so been acted upon invariably ever since.

Upon these grounds, it appears to me perfectly clear that the Judges in Ireland arrived at a satisfactory conclusion when they came to the result that the respondent was entitled to renewal of this lease in the terms of the deed.

I should notice that the rent, as stated in the memorial, is different from the rent now paid ; but that is all explained in the deed of 1750, because it seems that the memorial, in reciting the subject matter of demise, comprehended certain acres called Butler's Acres, which had afterwards lapsed, and then that some reduction was made in the rent.

Then the only other question raised, but which has been abandoned, whether a sub-denomination called *Gurtmunga* was included in the lease ; it is perfectly clear that it was ; so the Master has found, upon evidence which satisfied him, and there is no objection to that. Upon the whole, I * am clearly of opinion that the judgment of the Court below was perfectly right, and shall move your Lordships that it be affirmed. * 459

LORD ST. LEONARDS. — My Lords, I entirely agree with my noble and learned friend in the conclusion at which he has arrived, and I think it only necessary to look at the circumstances connected with the deeds, in order to show that there is really no question to be discussed. The whole case shows that there is no point to be decided, after the facts stated by the appellants are known.

The points made before your Lordships have been, first, with reference to the evidence of the memorial of 1746, that is, the operation of that evidence ; secondly, as to the construction of the covenant for renewal stated in the memorial, contrasting that with the covenant contained in the lease of 1750, the appellants insisting that, in consequence of the discrepancy between the two covenants, the one must have been released and a new obligation created by a contract between the parties ; and the last point is, that, at the different times when the leases — six, I think, in number — successively were granted, the persons who granted them had not a sufficient estate to bind the inheritance of the present appellants.

It has been made a great question in reference to the memorial,

which is signed only by the party who takes the interest, whether that of itself, by its own force, shall be considered as binding the estate of the grantor? That is a totally different question from that which is now before your Lordships, because here the question is whether or not the memorial can be considered as secondary evidence of the contents of the instrument of 1746; and consider-

ing the length and nature of the deeds by which it has
* 460 been recognised,* and considering the statute itself under

which that memorial was enrolled, and the proof which accompanies that memorial, and bearing in mind, too, that of course every memorial is signed by the person who takes the interest, because it is he, and not the grantor, who wants the protection of the register, I certainly am of opinion — and I think the authorities will not impeach that opinion — that this memorial is good secondary evidence of the contents of the deed of 1746, it being proved upon search that the deed has actually been lost.

It is not necessary to go through the cases; *Scully v. Scully* was referred to on this point. I was myself counsel in that case, when it was in this House, and I see it mentioned among the cases cited in the Court below, but without reference to that question, which therefore I must take for granted was considered as settled. I have very full notes of the argument upon both sides, and I find no mention of argument upon that point. I must therefore assume that that question was not seriously agitated, because if it had been, I think I should have noticed it as one of the points which had been seriously discussed, and decided.

If you look at the register of the memorial, you will find a witness, according to the requisition of the Act, expressly swearing that he is a witness to the articles themselves, and to their execution by "the above-named parties"; that he saw the "said John Chawner duly execute the above memorial"; and that his name was put as a subscribing witness, and that he delivered it to the register on the 7th January, 1746. So that you have an affidavit put upon record, under the authority of the Act of Parliament, as to the execution of the memorial necessary to secure the title of the person taking from the grantor, and also as to the actual execution of that deed which is no longer forthcoming;—

* 461 that is proved by evidence taken in the course * of the case.

Then the question is, the deed being lost, and the possession having gone for a century according to that deed, whether or not

that memorial is secondary evidence of its contents ? I confess I should be ashamed of the law of England if such evidence as that could not be received from necessity as secondary evidence.

But this case does not depend upon that mere question of secondary evidence. At the same time, however, I must point out to the appellant that his argument entirely bears against himself, because, unless he can set up the articles of 1773 against the lease of 1782, he has not a shadow of a case to rest upon. But then his only proof of the articles of 1773 is by a memorial of exactly the same tenor as the memorial of the deed of 1746, and therefore, if he prevailed upon that point as to the deed of 1746, he could not at all remove the force and validity of the lease of 1782 by the supposed articles of 1773, for he would then by his argument entirely remove those articles out of the case. His argument, therefore, unfortunately for him, is a two-edged sword, which, whilst it may damage his adversary at one moment, destroys himself at another.

It is said that the lease of 1750 must be supposed to be a new contract, because there were the same lives in it that were in the articles of 1746, and that the renewal was before the dropping of the lives. The lease itself explains why that took place. The lease of Butler's Acres had fallen in ; there was consequently a division of the property, and it became necessary to have separate leases. That therefore accounts for what I may call the repetition of the lease of 1746 in that respect, by a demise for the same three lives, and that was the ground why that lease was executed. There was, therefore, a solemn lease executed, reciting that instrument of 1746, though not in exactly the same terms, which is conclusive to my mind, as the memorial does *not * 462 profess to be an exact copy of the covenant ; it would not be required to be so under the Act of Parliament, but is a general statement of its effect. When I see that covenant in the instrument of 1746 intended to be carried into effect in 1750, by a person having at that time nothing more than a mere life estate, but who had an estate of inheritance at the time he executed the deed of 1746, I must take for granted that what I find upon the face of that deed of 1750 is a true exposition of the meaning of the covenant of that deed of 1746, which is no longer forthcoming. From that time, 1750 down to 1853, I may say every renewal has been based upon that instrument of 1750. But then it has been said at the Bar that you cannot possibly decree a specific performance

upon the lease of 1750, because it would be contrary to the decree, which is for a lease according to the instrument of 1746, and you cannot exclude that deed. That depends entirely upon the state of the pleadings. I understand that the original bill asked for a specific performance of the covenant for renewal in the lease of 1750. To that it was objected that at the time that deed was executed, the grantor was only tenant for life: Then the bill was amended, and the articles of 1746 were put in issue. Then of course the decree was founded on those articles. But there is nothing, according to the principles of Courts of Equity, which, if this objection could prevail, would prevent a Court of Equity from giving, if circumstances warranted it, a specific performance according to the lease of 1750.

Now, if we trace the different leases and the times when they were granted, there may be a question, which it is not worth entering into, how far those leases would have bound the inheritance, independently of the deed of 1746, in consequence of the limited nature of the estate of the persons who granted

* 463 them; but let us come down only to that *transaction of 1770, when the lease was renewed under the authority of the Court of Chancery in Ireland. That was an application made under the Irish Act of Anne,¹ which Act authorised the Court of Chancery or of Exchequer, after full examination of the facts, to direct guardians to grant renewals of leases for lives as the representatives of persons under disabilities. It is clearly impossible but that the whole title must have been then investigated; and at that time, for aught I know to the contrary, the deed of 1746 may have been produced; and if I had to direct a jury, I should most certainly say that it must be presumed to have been produced before the Master and before the Court; because the Lord Chancellor did, during the infancy of Thomas Sadlier, direct his guardian to execute a renewal of that lease; and that lease was accordingly renewed. Can your Lordships have a doubt that then, when the facts must have been known so much better than they can be now, what was so done was rightly done? Are we to presume the reverse, and to say that that which was then considered right must now be wrong, because by lapse of time the instrument has been lost which might then have been forthcoming? To my mind it is perfectly satisfactory that at that period the Court of Chan-

¹ 11 Anne (Ir.) c. 3.

cery was satisfied that it was duly executing the power given to it by the statute, in directing the tenant in tail to dispose of his valuable inheritance by a lease for three lives, under a specific covenant for renewal at a very small fine. Well, then, the inheritance was parted with, that is, the *quasi* inheritance for three lives was parted with, under the authority of the Court.

Now, without troubling your Lordships after the full * opening of this case by my noble and learned friend on * 464 the woolsack, with any thing about devolution of title, I come at once to that which would of itself form just as good a title, in connection with the former deeds, as any man ever possessed to any estate in this country. The lessee, Biggs, who claimed under the original lessee, Chawner, filed a bill, I think, in 1779, for a renewal of the lease. Thomas Sadlier, described in the answer to that bill as the tenant for life, did not raise these objections at all; he raised a collateral issue with reference to whether some property that was in dispute, which had formerly fallen in, was renewable or not; and he said by his answer, that if he was forced to give a specific performance, he trusted it would be only upon the terms which he mentioned with reference to that collateral issue; but in his answer he did distinctly admit, without the slightest qualification, the deed of 1746; he admitted the deed of 1750, and the other renewals; and in no respect attempted to impugn them. What can be said of such things? Suppose it did not bind the inheritance; it is a statement by a man deeply interested, who was called upon to renew, who would lose the benefit of the estate for his life, and whose children would be bound by the renewal unless they could impeach it. Instead of going to a decree, he executed a deed, the first deed that was executed between these parties, and which in point of fact put an end to the suit. That deed recites that it is made between Thomas Biggs of the one part, and Thomas Sadlier of the other part, who had been parties to a suit in which "several proceedings" were had; and then it goes on to say, "It hath been agreed upon by and between the said parties to these presents, that the said lease should be renewed in the usual and ordinary manner, and in case the said Thomas Biggs should be dispossessed of any of the said lands in consequence * of a claim made by one Augustine Duggan, and to support which claim a bill was filed by the said Duggan," then the rent was not to cease, but the

tenant was to have compensation; and then, in consideration of a certain sum of money, there being a dispute about timber, Sadlier conveyed to Biggs the timber standing upon the estate. Now that is on the 6th of March, 1782; there is to be a renewal "in the usual and ordinary manner"; no longer any dispute about the deed of 1746, or the interest, or whether the inheritance was bound or not; but this person in possession of the estate, entitled to the enjoyment of it for his life, and his children after him, consents to execute, "in the usual and ordinary manner," a renewal. In the lease made in March, 1782, there is this recital: "Whereas the right of renewing the annexed indenture of lease is now legally vested in the said Thomas Sadlier, and whereas the right of renewal and benefit of the said annexed lease is now vested in the said Thomas Biggs." It is impossible that any thing can be more conclusive than that; because, if I am to put it upon the ground that the persons cannot be bound who have granted these leases, yet you would find it impossible to affect a lease, granted as this was, after litigation, and with the full knowledge of all the circumstances. Now, as I understand, though there are so many Thomas Sadliers,—I think there were four of them in succession,—this Thomas Sadlier was the grantor in the supposed articles of 1773, and he was the grantor in the settlement of 1784, and I must assume Thomas Sadlier to be at that time entitled to the inheritance he is dealing with, the inheritance which is claimed under him. I cannot, therefore, see where the question is. But these deeds are dated in 1782, and it is said that they are invalidated by the effect of the prior settlement of 1773,

*466 settlement made in contemplation of marriage. Now * the only evidence of that, lying before me at this moment, is the memorial to which I have already referred. If the objection against the memorial of the deed of 1746 should prevail, then those articles of 1773 cannot be read. But I will assume that they can be read. We have nothing, then, but the articles to go by. Those articles are simply and only to provide a jointure of 100*l.* a year for the wife for her life, for which the estates are placed in the hands of trustees as a security. That does not affect the lease of 1782 at all. And when you come to the post-nuptial settlement of 1784, which of course cannot bind and overrule the lease of 1782, I noticed during the argument that there is a curious recital there, as if they wanted, if possible, to make a

foundation of something to rest their settlement upon. The recital is in this form: "That by indented articles of agreement made on the 19th of February, 1773, between the said Thomas Sadlier, party to these presents, of the one part, and the said William Woodward the elder and the said Rebecca, by the name of Rebecca Woodward, eldest daughter of the said William Woodward, of the other part: Whereas a marriage is intended to be had and solemnized between the said Thomas Sadlier and said Rebecca now his wife, he, the said Thomas Sadlier, in consideration of the sum of 500*l.* sterling by the said William Woodward the elder, covenanted to be paid to said Thomas Sadlier, and for other the considerations in said articles mentioned, doth covenant and agree with the said William Woodward the elder, his heirs, executors, and administrators, that he, the said Thomas Sadlier, will settle and convey the several lands therein mentioned and expressed, as near as may be, in reference to the parties concerned in such settlement, who shall be living at the time of making thereof." I do not perceive from the evidence * that what * 467 is there mentioned as expressed and contained in the deed of 1773, is in the memorial of it on your Lordships' table; that memorial is strictly confined to what I have told you, namely, providing a jointure for the intended wife. But then it is said that as the lease in 1782, though prior to the settlement of 1784, was subsequent to the settlement of 1773, that settlement bound everybody claiming under the settlement of 1784. Well, that is the question; but if you were to follow this up, which it is really a waste of time to do, you would find they have continued executing settlements and renewing leases from time to time down to 1814, always in the terms of, and almost as it were, in connection with the settlement, when it is utterly impossible that the persons granting those leases should not have been aware of the nature of the acts they were doing; and in every one of them it is remarkable that every man who grants a lease assumes to have an inheritance to enable him to do so, and therefore a more scandalous fraud could not have been committed than would have been committed upon those lessees, if the title could be impeached in the way now suggested.

The settlement of 1784 does not expressly except all leases, but it excepts, in terms, all leases which were *bona fide* leases of any part of the property. But the man who made that settlement

knew perfectly, of course, that he had two years before granted the lease, after a litigation ; clearly, therefore, there was no surprise upon him. It was after a litigation of several years ; it was the termination of the litigation, the completion of it, and was in lieu of a decree under it. Indeed he became his own Chancellor, and finding that he had no merits, he submitted to that which was clearly against him, and having executed a lease of the property,

he takes care, upon his marriage, not to leave himself open

*468 * to any demand for damages by those who might claim under him, his children, or grandchildren and other parties and his intended wife, because he says, "I convey this estate to you subject to any leases *bond fide* made." This lease was beyond all question, *bond fide*, and therefore he conveyed the estate expressly subject to the lease of 1782.

My Lords, the only other question, if question it can be called, is whether, if you are to go back and rely upon the lease of 1746, there was or was not a covenant for perpetual renewal ? If there was not, you must reject these words "for ever." They come in awkwardly enough, I admit ; but you must reject those strong words if you say there is not a covenant for perpetual renewal. I asked in vain of the learned counsel, who is very competent to give an answer when any can be given, what sense was to be attributed to the words "for ever," if that was not their meaning ? He could give no other. Can you reject them ? Can your Lordships be called upon as a Court of Equity to reject those large words, expressive beyond all others that the English language contains ? There is no other phrase so fitted to express what the parties intended, that this lease is to be renewed for ever. The fines are to be paid for ever ; supposing you construe it in that way that the fines are to be paid for ever, that must be of course in consideration of — what ? why of renewals for ever ; because fines are only to be paid upon the renewals. If, therefore, you consider that those fines were expressly stated as a perpetual payment, that of itself implies a perpetual renewal, upon which alone those fines could be paid.

was cited, upon which I will not detain your Lordships a moment, viz. *Baynham v. Guy's Hospital*.¹ Without saying whether that case was rightly or * wrongfully decided, I do not think it has any bearing upon the present. so in that case showed that the parties did not intend to

¹ 8 Ves. 295.

go beyond the lives. That case is one confined to lives, and has no bearing upon this which is now before your Lordships, because there the question simply was whether or not, upon the due construction of the covenant, there was any thing more than a covenant for the further assurance of the particular lease which had been granted.

My Lords, I have occupied, I am afraid, more time than the case deserves, but upon the whole I never entertained a clearer opinion in my life than I do upon this case; and I have the satisfaction of agreeing with my noble and learned friend, in coming to the conclusion that the justice of the case is in all respects met by the construction which has been put upon it by the Court below. With regard to costs, there cannot be any sort of doubt that the question raised upon this appeal ought never to have come to your Lordships' house. I therefore entirely agree with my noble and learned friend, that the judgment of the Court below should be affirmed, and I recommend your Lordships to affirm it with costs.

LORD BROUGHAM.—In consequence of unavoidable absence I did not hear this case argued, and therefore I only rise to say that I totally differ from my noble and learned friend in one respect, namely, in thinking that he has occupied one moment of your Lordships' time too long, especially when we recollect that only one side has been heard at your Lordships' bar. Under such circumstances, it becomes absolutely necessary that the judgment of this House should be given upon the fullest consideration, for the *assurance of the parties that your Lordships, in *470 considering the case and in affirming the judgment below without hearing the respondent, have carefully applied your minds to the whole argument.

Decree affirmed, with costs.

It was afterwards ordered, "that the appeal be dismissed, and the decretal order of the 15th November, 1847, and the decree of the 5th February, 1851, be affirmed with costs."

Lords' Journals, July 5, 1853.

*471 *THE QUEEN v. SOUTHEASTERN RAILWAY CO.

1853. June 29; July 4, 14.

THE QUEEN, on the prosecution of C. EDWARD, Plaintiff in error.
 The DIRECTORS, &c. of the SOUTHEASTERN RAILWAY, } Defendants in error.

*Mandamus. Railway Bridge. Option. Pleading. Practice.
 Costs.*

Under the 8th & 9th Vict. c. 20, § 46, a railway company has the option, when its line of railway crosses a turnpike road or a public highway (except when otherwise provided by the special Act), either to carry the road over the railway or the railway over the road. A mandamus to command the company to do one of these two things is therefore defective unless it shows, on the face of it, circumstances which establish the impossibility of the company exercising this option.

Where such a mandamus had been issued, and the return had merely traversed that the road was a public road, and the issue thus raised had been found against the company, and a peremptory mandamus had been awarded:—

Held, that on a writ of error, the Court of Error being satisfied that the mandamus itself ought not to have issued, had properly reversed the whole judgment. By the Judges: Upon a judgment awarding a peremptory mandamus, the costs are not those awarded at the discretion of the Court, under section 6 of 1 Wm. 4, c. 21, but are the general costs under section 4 of that statute.

IN 1849, a writ of mandamus was issued to the defendants, which recited that a railway made by the defendants "crossed, not on a level, a certain public highway, situate and being in the parish of Plumstead, in the county of Kent, called the Plumstead Villas Road, by means of a certain trench or cutting 20 feet deep and 65 feet wide," and that "the permanent way thereof is laid down therein, and the said public way is thereby cut through and destroyed, and rendered wholly impassable for passengers and carriages." The mandamus then recited that reasonable

*472 time had been given to the defendants * to enable them to carry the road over the railway, but that they had refused to do so, and it commanded them "to cause the said public highway to be carried over the said railway by means of a bridge, in conformity with the regulations" contained in 8 & 9 Vict. c. 20,

the "Railway Clauses' Consolidation Act, 1845,"¹ the directions in which were then in detail set out. The defendants made a return, "that the said way or road in the said writ mentioned, was not a public highway as in the said writ is in that behalf alleged." Issue was taken on this traverse. The case was tried at the summer assizes at Maidstone, in 1850, before the Lord Chief Baron, when a verdict was returned for the Crown, finding that the Plumstead Villas Road was a public highway. A rule for a new trial was applied for and refused, and judgment was signed in November, 1850. The defendants brought a writ of error in the Exchequer Chamber, and the errors assigned were, that it was not stated that the alleged highway was such at the time of the passing of the Company's special Act,— that no sufficient damage was alleged,— and that by the writ the defendants had not the option of carrying the road over the railway or of carrying the railway over the road, according to the statute (8 & 9 Vict. c. 20), but were deprived of that option. The Court of Exchequer reversed the judgment of the Queen's Bench,² and the present writ of error was brought on that reversal.

The Judges were summoned, and Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Cresswell, Mr. Justice Erle, Mr. *Justice *473 Talfourd, Mr. Baron Platt, Mr. Justice Williams, Mr. Baron Martin, and Mr. Justice Crompton attended.

Mr. Bramwell and Mr. Needham (*Mr. Raymond* was with them) for the plaintiff in error.— The point now to be considered is, whether, by the effect of the "Railway Clauses' Consolidation Act, 1845," the defendants had an option to carry the bridge over or under the line of railway. It may be admitted that, as a general rule, the 46th section of the 8 & 9 Vict. c. 20, gives them an option; but that general rule is subject to exceptions arising from circumstances. If circumstances alone could decide the question, the depth of the cutting, as set forth on the face of the proceedings, shows that it is absurd to suppose that the defendants can be at

¹ 8 & 9 Vict. c. 20, § 46. "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width and with the ascent or descent by this or the special Act in that behalf provided."

² 20 Law J., N. S., Q. B. 428.

liberty to carry this bridge under the railway. Some of the exceptions present themselves in the sections which relate to the heights of streets, and to deviations; for those sections provide for a state of things in which it would be impossible to follow the words of the statute and yet to leave the defendants the liberty of option now contended for.

It is objected to this mandamus, that it does not give to the defendants this option; but on the face both of the mandamus and return, the two parties have assumed that if the line is to be made at all across this road, it is to be carried over the road. Now every intendment is to be made in favour of a pleading on which an issue of fact is raised by the adverse party pleading *over*¹ "in such a manner that an omission or informality therein is expressly or impliedly supplied," and the same result follows by intendment

after verdict.² That must especially be the case where it

* 474 appears, as it does here, that both parties have * assumed the same state of things. Supposing, however, that the defendants have an option as to the mode of making the road, if there are circumstances which render that option impossible, the parties who set up the claim to the option must show that the circumstances are such in which they could conveniently exercise it. This is especially necessary here, because the right of an option is inconsistent not only with those enactments already alluded to, but with those provisions of the statute (s. 56) which direct that "if the road can be restored compatibly with the use of the railway, the same shall be restored to as good a condition as before"; and if not, then a new one is to be made "equally convenient as the former road." There is, therefore, a state of things in which the

defendants to carry the bridge over the road, and to show that that state of

Nothing of the sort is even suggested by the writ, and assumes that the acts there set forth do actually prove that this is not a public highway, and that before the defendants had not obtained a warrant to carry the railway by means of a writ of *mandamus*, the objection as to the jurisdiction thereon, the objection as to the validity of the warrant, and the objection as to the propriety of carrying the railway over the road, were all sustained.

¹Leading, 7th ed. vol. 1, p. 703.

[THE LORD CHANCELLOR.—*The Mayor of London v. The Queen*¹ shows that the common rules of pleading do not apply to a mandamus.]

The distinction between the two cases is, that in that case there was a demurrer to the return, while here the proceeding is in the nature of an action for a false return, and the pleading over is on a matter of fact which is found in favour of the party suing out the writ.

* [THE LORD CHANCELLOR.—The difficulty here is in *475 issuing a writ which commands persons to do what they have no power to do.]

The peremptory mandamus needs not follow exactly the original suit; or, if it does, it may be accompanied by certain recitals which show that the other was founded on a good ground of right. But there is another distinction between the case referred to and the present. In that case the return might be quashed, but here no such judgment could be given after traverse of fact and verdict.² The words of the 46th section do not give the option now contended for. They give an alternative in the mode of crossing the highway; but describing two states of circumstances, and two modes of dealing with them; the plain construction of the proviso is, that in one set of circumstances the road shall be carried over the railway, while in another the railway shall be carried over the road. The 66th section shows that a strict compliance with the statute is required in all cases, and the only exception allowed is where the Board of Trade has authorised a modification of its provisions with regard to the construction of roads and bridges.

Sir F. Kelly and *Mr. Willes* for the defendants in error.—The words of the 46th section give a clear option to the defendants as to the mode in which they shall make the railway cross the road. The special Act constituting this company was passed on the 3d of August, 1846, and the defendants have by that Act seven years from that date for completing the railway. Within that time they may make any alteration they think necessary, and till then they cannot * be compelled to exercise the option which the *476 statute has given them. They may, likewise, alter the whole line of road, and carry the railway to a spot where no bridge over

¹ 13 Q. B. 1, 40.

² 1 Wms. Saund. 228.

or tunnel under the road would be necessary. The mandamus is, therefore, at all events premature. It is also defective in itself. It cannot be shown on the face of the mandamus, as matter of law, arising upon the facts there set forth, that the road could not be carried under the railway ; but if not, then the mandamus is bad, for the defendants have, under the 16th section of the statute, most extensive power as to the making and altering roads, &c. ; and under the company's Act they have seven years from the date of the Act to make any necessary alterations.

Mr. Bramwell, in reply. — It may be admitted that the defendants had an option as to how they would construct the crossing of the road and railway ; but when the railway was so finished as to be in working order, that power of option had been exercised and was at an end. The 66th section of the statute itself forbids the defendants to close the railway after it has been once opened. To claim, under the company's Act, the power for seven years of altering the road, is, therefore, to claim that which is against all reason, which the Legislature never could have intended, and which, by the general statute, it has rendered impossible.

By the 6th and 7th Vict. c. 67, the proceedings on a writ of error in a mandamus are assimilated to the proceedings in personal actions. If, therefore, the defendants should be deemed entitled to exercise the option now contended for, and the mandamus should be held defective on that account, still the judgment on it ought not to be wholly reversed. The fact that this is a public road remains established, and the plaintiff is entitled to judgment on that finding of fact.

* 477 * *Sir F. Kelly*. — It is clear that in this case there can be no judgment on the traverse in the return, or on the verdict of the jury thereon, except that a peremptory mandamus should issue.

THE LORD CHANCELLOR. — My Lords, — In this case there has been a mandamus, and on the writ of error several points are made. It is said that the mandamus is bad, because it commands the defendants to do one of two things, they having by law an alternative, a choice to do either one or the other. And secondly, if that argument fails, then it is said, still they are commanded to do one

of two things, there being another right remaining to them, which will render the performance of one of these two things unnecessary, because they may choose to alter the line of railway to make another where no bridge or tunnel will be necessary to be carried either over or under the road. That has been the view taken by the Court of Exchequer Chamber, where the judgment of the Court of Queen's Bench was reversed.

Then it is said, supposing there is a defect in the mandamus, still that has been cured by the traverse, which adopted the statement in the writ except as to a particular fact, and that that fact has been found against the defendants. And, lastly, it has been suggested that at all events the judgment in the Exchequer Chamber ought not to have been a reversal of the whole of the other judgment; but something less than that.

Under these circumstances, my Lords, I propose to put these questions to the learned Judges: —

1. Whether it appears on the face of the mandamus that the defendants in error were by law bound to do the act which they are thereby commanded to do?

* 2. Whether, if it does not so appear, the defect is cured * 478 by the traverse and subsequent pleadings?

3. If the Judges in the Queen's Bench were wrong, what judgment ought to have been given by the Exchequer Chamber?

MR. BARON PARKE, in the name of the Judges, requested that they might be allowed time to answer these questions.

Ordered.

July 4.

MR. BARON PARKE. — To the first of the questions proposed by your Lordships, I have to give the answer of all the Judges who heard the argument, that, in their opinion, it does not appear on the face of the mandamus that the defendants in error were by law bound to do the act which they are thereby commanded to perform.

The duty arises from 8 Vict. c. 20, § 46, which provides (see ante, 472, note). Nothing in this case turns upon the latter part of this section. We are of opinion that this section, which, in the ordinary meaning of the language used, directs one thing or the other to be done, and does not say which, clearly gives to the party who is to do the act the election to do which act he pleases. The writ, therefore, ought to have given the election to the defend-

ants, and is invalid, unless it assigns on the face of it some sufficient reason why they are no longer to have the option at the time of issuing it, but are compellable by law to do the act commanded ; that is, to make the bridge for the highway over the railway. We think the writ suggests no sufficient ground to deprive them of this option, and therefore does not show that the defendants were bound to do the particular act commanded.

If the writ had sufficiently stated on the face of it that it was originally impossible, from local circumstances to carry

* 479 * the railway over the highway by a bridge, or that it originally was or had become impracticable to do so, so as to comply with the express regulations in the Act applicable to a railway crossing over a road, that might have shown a sufficient obligation to erect the bridge over the railway, and to deprive the defendants of the option which they once had of carrying the railway over the highway.

So also, if it had sufficiently appeared that the defendants had determined their election, by finally fixing the level of the railroad below that of the highway, in such a way that the defendants had no other alternative than to erect a bridge for the highway to go over it.

But we are all of opinion that none of these circumstances sufficiently appears on the face of the writ to justify the mandatory part.

The allegation that a trench had been made of the depth of twenty feet (assuming that to be strictly true), through which the railroad passes, and by which the highway has been cut through and destroyed by the company, does not necessarily show that it was then impossible to lower the highway, and carry the railway by a bridge over it, in the exercise of the lawful powers of

the sixteenth section ; nor is the averment, way of the railroad is laid down therein, sufficient to show that the defendants have bound themselves finally to adopt that level, and that in such a way as to be open to comply with the Act of Parliament to carry the railway over it. Consistently with that allegation, recoding one, the defendants may still, under the power given by the Act, carry the railway over the road by a bridge.

on circumstances connected with the local highway and railroad, and upon nice ques-

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tions of engineering, which we are not able to decide.

* Some evidence is stated on the face of the mandamus, *480 having a tendency to prove the necessity of making a bridge for the highway, but the material allegations are wanting.

To the second question, whether, if it does not so appear, the defect is cured by the traverse and subsequent proceedings, we answer, that the defect is certainly not cured.

No fact is added by the pleadings. The only effect of them is, that the allegation that the alleged highway was such, is proved, which must have been assumed to be true if it had not been traversed.

Besides, the case of *The Mayor of London v. The Queen* in error,¹ is a decisive authority that even an express admission in the return of a fact necessary to make the writ valid does not supply the defect. I am desired, however, to intimate that my brother Coleridge has some doubt about the propriety of that decision.

The remaining question is, if the judgment in the Queen's Bench was wrong, what judgment should have been given in the Exchequer Chamber?

We all think that the proper judgment has been given in that Court, "that the judgment of the Queen's Bench should be reversed, annulled, and altogether holden for nought; that the defendants below should be restored to all they have lost by reason of the judgment; and that the writ of mandamus is insufficient in law, and should be quashed."

The judgment of the Court of Queen's Bench is, "that a peremptory mandamus should issue, and that Charles Edwards, the prosecutor, do recover his damages, costs, and charges, and costs of increase."

Both parts of this judgment must be reversed.

These costs are not the costs awarded at the discretion of * the Court under 1 Wm. 4, c. 21, § 6, as the costs of the *481 application for a writ of mandamus, but the general costs of the cause to which the prosecutor would be entitled under section 4, extending the Statute 9 Anne, c. 21, to every sort of mandamus.

By the second section of that statute the prosecutor, in case he obtains a verdict, shall recover his damages and costs, in such a

¹ 13 Q. B. 1, 40.

manner as he might have done in an action on the case for a false return of a mandamus. In such an action, if the mandamus had been on the face of it invalid, and the defect had appeared on the record, the plaintiff could not have recovered any damages, for if the writ gave him no right, the foundation of the action would have failed, as there would have been no obstruction to a right.

July 14.

THE LORD CHANCELLOR.—My Lords, this case comes before the House upon a writ of error from the judgment of the Court of Exchequer Chamber upon a writ of mandamus, that Court having reversed the judgment for the peremptory mandamus which had been issued by the Court of Queen's Bench.

The mandamus which was issued at the instance of Edwards against the defendants, commanded them to carry the public road or highway over the railway by means of a bridge. [His Lordship read the recital and the mandatory part of the writ, describing what the bridge is to be, and stated the pleading, the finding of the jury on the fact, and the judgments of the Courts of Queen's Bench and Exchequer Chamber.]

The matter has now been brought before your Lordships. We have had the assistance of the learned Judges, thirteen of whom were present, and they were unanimous in their opinion that the judgment of the Court of Exchequer Chamber was right.

* 482 * That being so, it is clearly unnecessary for this House to do more than to say that it entirely assents to the view which has been taken of the case by the learned Judges. It may, however, be just proper to say, that the case, when it is looked at, admits of no doubt ; and in coming to this conclusion we are in fact affirming the unanimous opinion of the Judges in all the Courts ; for, as far as I can ascertain, it does not seem that the point now before us was ever raised and considered in the Court of Queen's Bench. The question there was upon an issue, in point of fact, which had been improperly raised, which issue was an immaterial issue ; but on the determination of which the peremptory mandamus seems to have been awarded as of course. But the real question arises upon a single short clause in the Railway Clauses' Consolidation Act. That Act provides [his Lordship read the clause]. It seems to me that on that clause the defendants have a right either to carry a bridge over the railway or to

carry the railway over the road. Now a mandamus cannot be right which commands them to do one of those things, unless it appears upon the face of the record that they have rendered it impossible that the other should be done. That certainly is not the case here.

Many ingenious speculations were put forward, and drawings were made with reference to their having cut a trench the depth of which it stated to be twenty-five feet, and which it was supposed rendered the carrying the railway over the road a matter of impossibility. But that statement is not made as a matter which is traversable. But let the depth of the cutting be what it may, still, if it is of any depth, it may be on ground of a certain kind, which not only allowed it to be possible, but rendered it expedient, in spite of their being a cutting of that depth, to carry the road underneath instead of over the railway. Therefore * it is plain that the mandamus discloses no impossibility to perform the other alternative allowed by the Act. * 483

And if that is so, the mandamus compelling the defendants to perform one of those alternatives, they having the option to perform either of them, must be wrong, and consequently ought not to have issued.

There was a point raised as to what the judgment ought to have been; but the learned Judges are clearly of opinion that the judgment was right, and the peremptory mandamus improperly issued. Consequently that judgment ought to be reversed, and in the language of the Court of Exchequer Chamber, which I move your Lordships to affirm, the judgment of the Court of Queen's Bench ought to be reversed, annulled, and altogether holden for nought, and the defendants must be restored to all things which they have lost by occasion of the said judgment, and the writ of mandamus is insufficient in law, and must be quashed; I therefore move your Lordships that this judgment of the Court of Exchequer Chamber should be affirmed with costs.

LORD BROUGHAM.—My Lords,—I entirely agree with my noble and learned friend. In this case, upon the point before us, the point upon which we are now deciding, there was no difference of opinion among the learned Judges. The judgment of the Court of Queen's Bench turned upon a question of fact. I entirely agree

with my noble and learned friend, that independently of the great weight of the authority of the learned Judges, there is no real doubt upon the question itself.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

Lords' Journals, 14th July, 1853.

1853. June 30; July 1, 4, 14.

SAMUEL ANDERSON, Plaintiff in error.
ANN FITZGERALD, Defendant in error.

Insurance on Life. Materiality of untrue Answers. Misdirection. Bill of Exceptions.

F. applied to an insurance office to effect a policy on his life. He received a form of "Proposal" containing questions requiring to be answered. Among these were the following: "Did any of the party's near relations die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" To each of these questions F. answered, "No." The answers were false. F. signed the proposal, and a declaration accompanying them, by which he agreed "that the particulars mentioned in the above proposal should form the basis of the contract." The policy mentioned several things which were "warranted" by F. The subjects of these two answers were not included in such warranty. The policy also contained a proviso, that "if any thing so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the company in or about the obtaining or effecting of this insurance," the policy should be void, and the monies paid should be forfeited. In an action on the policy: Held, reversing the judgments of the Courts of Exchequer and Exchequer Chamber in Ireland, that it was a misdirection to leave it to the jury to say the answers to the two questions were material as well as false, and if so, that the plaintiff was entitled to the verdict. The representation of the contract, its truth, not its materiality, was in question.²

2. A Bill of Exceptions, which sets forth what a Judge was asked and alleges that he refused to give such direction, is informal and may Docks Trustees v. Gibbs, 11 H. L. Cas. 686, 694, Law Rep. 1

bad. A Bill of Exceptions should state what directions the Judge gave, as it is misdirection, and not non-direction, which is the subject of an exception.¹

THIS was a writ of error on a judgment of the Court of Exchequer Chamber in Ireland. Ann Fitzgerald was the administratrix of one Patrick Fitzgerald, deceased. *The defendant Anderson represented the United Kingdom Life Assurance Company. The action was brought against Anderson on a policy of insurance effected with that company upon the life of Patrick Fitzgerald. The declaration, which was in the usual form, set forth the policy, in which was a warranty that, amongst other things, the assured was not afflicted with any disease tending to shorten life ; that he led, and continued to lead, a temperate life, and that he had a sound and good constitution. The policy also contained a proviso, which, after providing against the assured going beyond the limits of Europe, or entering the military or naval service, proceeded thus : "Or if any thing so warranted as aforesaid shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said company, or if any fraud shall have been practised on the said company, or any false statements made to them in or about the obtaining or effecting of this insurance, this policy shall be null and void ; and all monies paid by or on behalf of the said Patrick Fitzgerald on account of this insurance shall become forfeited." The declaration then contained the usual averments of the fulfilment of all matters requisite to be performed on the part of the deceased and his representatives by the terms of the policy, and negatived the doing of any of the matters which might have vitiated the policy.

The defendant pleaded, first, *non assumpsit*, and secondly, a special plea, setting forth the "proposal and statement" which Fitzgerald had signed, and which contained among others the following declaration, "that none of his near relations had died of consumption, or any other pulmonary complaint, and that his life had not been *accepted or refused at any other as- *486 surance office" ; and the plea alleged that "it was agreed between Patrick Fitzgerald and the company that the particulars

¹ M'Mahon v. Lennard, 6 H. L. Cas. 986.

stated in the declaration should form the basis of the contract between him and the company, and that if there should be any untrue allegation contained therein, or any misstatement, the insurance should become forfeited, and the policy should be void." The plea then alleged that "the proposal and statement did form the basis of the contract, and that they were false, and contained untrue and unfaithful representations, inasmuch as Patrick Fitzgerald was then afflicted with a disease of the lungs, &c., and that two of his sisters had died of consumption, and that his life had already been accepted at six different assurance offices and refused at six others." The third plea in like manner set forth the statement made by Fitzgerald, as made to Dr. Russell, the medical officer of the company, and then alleged that the said statement was false, and contained an untrue and unfaithful representation of the facts (setting forth among others), "that two of his sisters had died of consumption, and divers others of his relations had died of pulmonary complaints," and that he had theretofore made proposals for insurance to other companies and was insured at divers other offices; and that these statements were made by Fitzgerald to induce Russell to report in favour of an insurance on his life. There were other pleas charging untrue representations as to his own state of health. The plaintiff replied *de injuria* as to the second and third pleas, and took issue on the others.

The cause was tried before Mr. Justice Ball at the Lim-
* 487 erick Assizes, in March, 1848, when the "proposal"¹ * for insurance was put in evidence, and the facts alleged in the plea as proofs of the falsehood of the proposal and statement were proved; but it appeared that the two sisters who died of consumption were respectively aged sixty-seven and sixty-five. The learned

¹ The "proposal" for insurance contained twenty-seven questions; among which were the following, with the answers thereto: "1. Age next birthday? Fifty-two years.—21. Did any of the party's near relations die of consumption, or any other pulmonary complaint? No.—22. Has the party's life been accepted or refused at any office? No."—The "proposal" finished with this declaration: "I hereby agree that the particulars mentioned in the above proposal shall form the basis of the contract between the assured and the company, and if there be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said company, or there shall be any fraud or misstatement, all money which shall have been paid on account of this insurance shall become forfeited, and the policy be void."

Judge directed the jurymen that they "must not only be satisfied that the various false statements relied on by the defendant were false in fact, and were made in and about effecting the policy, but also that such false statements were material to the insurance, before they could find their verdict for the defendant." The defendant's counsel tendered a bill of exceptions to this ruling, on the ground that the jury should have been directed that, if the statements were made in and about the effecting the insurance, and such statements were false in fact, the defendant was entitled to a verdict, whether such statements were or were not material.¹ The verdict * was given for the plaintiff for 450*l.*, the sum * 488 secured by the policy. The exceptions were argued in the Court of Exchequer, when the Lord Chief Baron expressed an opinion that they ought to be allowed, but Mr. Baron Richards and Mr. Baron Lefroy being of a different opinion, judgment was ordered to be entered for the plaintiff. A writ of error was

¹ The bill of exceptions set forth the whole evidence, and proceeded to make the following statements: That the defendant's counsel called on the Judge to direct the jurors, that if, previous to the making of the policy, any false statement was made to the company in or about the obtaining or effecting of the said insurance, though the jury should believe that the same was not material to the insurance, they should find a verdict for the defendant. "But the said learned Judge then and there refused so to direct the jury." That the defendant's counsel called on the Judge to direct the jury, that if the statement as to the refusal or acceptance of the life at other offices was false, the verdict must be for the defendants, although the jury might believe such false statement not to be material; but that he refused so to direct the jury, and told the jury to find whether the statement was false, and if false, whether it was material, and if the jurymen believed the statement to be "both false and material, they should find a verdict for the defendant on the first issue." There were similar exceptions as to the direction with regard to the answers of Fitzgerald as to his having had any relations who had died of consumption, and as to his making the insurance for the benefit of his family only. In each of these the Judge had directed the jury to find whether the statement was material as well as false. These exceptions related to the first issue; with regard to the second issue, the bill of exceptions stated that the defendant's counsel called on the learned Judge to direct the jury to find for the defendant, if the jurors should believe that two of Fitzgerald's sisters had died of consumption, and that his proposals for insurance had been accepted or had been refused at any offices, and that he had answered untruly as to such matters, as in the second plea alleged, although the jurors might believe his other statements to be true; and the bill of exceptions went on to state, that "the said learned Judge then and there refused so to direct the jury." There was a similar exception as to the issue on the third plea, and the refusal of the learned Judge so to direct the jury was alleged in the same negative terms.

brought in the Court of Exchequer Chamber, where, by a majority of seven to three, the judgment of the Court below was affirmed.¹ The present writ of error was then brought.

The Judges were summoned, and Mr. Baron Parke, Mr. * 489 * Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Cresswell, Mr. Baron Platt, Mr. Justice Talfourd, Mr. Justice Williams, Mr. Baron Martin, and Mr. Justice Crompton attended.

Sir F. Kelly and *Mr. Bovill* for the plaintiff in error. — The verdict here was wrong, and that was occasioned by an erroneous direction on the part of the Judge. The judgment of the Court below, affirming that direction, cannot be sustained. Fitzgerald was bound to answer all the questions put to him without fraud, and truly. He answered them falsely. These false statements of his were made "in and about the obtaining or effecting the insurance," and being false, the insurance effected was void. No question was or could be raised about the materiality of these answers. If they related, as the plea alleged, to the effecting of the insurance, they were required to be true. There is nothing in the pleas which raises the question of materiality, but the whole issue turns on the question whether there were false statements and untrue representations made in and about effecting the policy.

In *Lindenau v. Desborough*² the question of the materiality of a statement was raised, and after that time the forms for effecting life policies were altered to what they are now. The truth or falsehood of a statement is now made to decide the validity of a policy. In *Duckett v. Williams*³ a statement, untrue in point of fact, though not to the knowledge of the party making it, was held to occasion a forfeiture of the premium. The case of *Geach v. Ingall*⁴ decided that where, under proposals like the present, the assured did not state that he had had a spitting of blood, * 490 it was a misdirection to ask the jury whether it * was such a spitting of blood as would tend to shorten life, the concealment of the fact being held to be a breach of one of the conditions. These cases were followed by that of *Southcombe v. Merriman*,⁵ which finally settled that, in all instances, the only ques-

¹ 1 Irish Law, N. S. 251.

⁴ 14 M. & W. 95.

² 8 B. & C. 586.

⁵ Car. & M. 286.

³ 2 Cromp. & M. 348.

tion must be whether the statements made in the answers to the questions contained in the proposals were true or false. There the rules of a society required that the assured should be of sober and temperate habits, and in an action on the policy it was held sufficient to show that his habits were intemperate, and that it was no answer to that fact for the plaintiff to show that the intemperance was not of such a sort as to injure the health of the insured or to shorten his life. The simple question of the truth or untruth of the statement, not the doubtful question of its materiality, is that by which the validity of the contract must be decided.

Mr. Napier and *Mr. Fitzgerald* for the defendant in error.—The bill of exceptions in this case is bad in form, and cannot be supported. The first exception which relates to the general issue merely complains that the learned Judge refused so to direct the jury, but it does not state what direction he should have given. That is erroneous. An exception will not lie for non-direction merely, it must be for misdirection. The statement made here is not sufficient; the terms of the Judge's direction ought to have been set out: *M'Alpine v. Mangnall*.¹

The correctness of the verdict is not now in question; but the direction to the jury was right. The question whether it was so or not must depend on the forms of the issues. The plea of *non assumpsit* was in this case quite *sufficient to raise *491 the question of materiality. The pleadings showed the distinction taken in the policy between what was matter of warranty and what was mere matter of representation. The former must be strictly complied with, and if untruth exists as to a warranty, the policy is no doubt void. But that is not so where there is no warranty; and in such a case the representation must be shown to be material as well as false, before it can effect the policy: *Pawson v. Watson*,² and *Bize v. Fletcher*.³

The policy itself raises the question of materiality. It recites that certain things are warranted by the assured, and of course that warranty must be strictly complied with. But then it goes on to mention other things which are not warranted, and it does so in a manner which shows that the parties contemplated the

¹ 3 C. B. 496.

* Dougl. 12, note, 284.

² Cowp. 785, Dougl. 11, note.

materiality of those things which were not warranted, as a kind of condition on which the validity of the insurance was to depend. The words are, "If any thing so warranted as aforesaid shall not be true, or if any circumstance, material to the insurance, shall not have been truly stated, the insurance shall be void." Here warranty on the one hand, and untruth and immateriality on the other, will vitiate the insurance. But as to the second class of matters, untruth alone will not have that effect. The circumstances must be material as well as untrue. The company itself has made this distinction, and must be bound by what it has thus done. It cannot depart from the terms of the contract which it has itself framed. Under these words, an immaterial circumstance being untruly stated cannot constitute a breach of the contract. The words of this contract, in themselves doubtful, must be construed, not in favour of the insurer who framed the contract, but against him, and in favour of the assured;

* 492 the * principle of construction being, that words are to be taken most strongly against those who introduce them into the instrument;¹ and that doctrine was affirmed in *Borradaile v. Hunter*,² though, on the particular circumstances of that case, the judgment was in favour of the insurer. The cases of marine insurance, *Pawson v. Watson*,³ and *Bize v. Fletcher*,⁴ show, that where there is a representation and not a warranty, the non-observance of the representation, unless fraudulent and material, will not avoid the policy.

In *Lindenau v. Desborough*,⁵ Lord Tenterden and the other Judges thought that that which was material affected the policy, and that nothing else did so. What is material cannot be left to conjecture; it cannot even be made the subject of doubtful and conflicting evidence; it must be declared in the contract itself to be material: *Campbell v. Rickards*.⁶ In the case of *Scanlan v. Sceals*,⁷ the judgment of Chief Baron Brady shows that where words are not expressly included in a warranty, they cannot be introduced as such by the force of implication.

In the proposals prefixed to this policy there are many things stated; some of these are material, some are plainly not material.

¹ Sheppard, Touchstone, ch. v. tit. 14, § 6, p. 87.

² 5 Scott, N. R. 418.

³ 8 B. & C. 586.

⁴ Cowp. 785, Dougl. 11, note.

⁵ 5 B. & Ad. 840.

⁶ Dougl. 12, note, 284.

⁷ 5 Irish Law, 139, 154.

It was therefore necessary, especially with reference to the passage in the policy already quoted, for the Judge to ask the jury whether the statements said to be untrue were material or not, for, if not material, they could not affect the plaintiff's right to recover. This was doubly important, because the proposals were not, as in *Scanlan v. Sceals*, incorporated with the policy.

Even what may be called fraud, committed as to some of * the matters mentioned in the proposals, if committed with regard to what is not material, will not vitiate the policy. * 493 It must be fraud in law to have that effect. Fraud in law must be a suggestion of falsehood, or a suppression of truth, with respect to some material matter; and if as to something immaterial, it cannot properly be said to be any thing relating to, or being in and about the effecting the policy.

Sir F. Kelly, in reply.—The bill of exceptions here is sufficient. Such a bill may perhaps not lie on a mere allegation that the Judge did not direct the jury; but an allegation that he was called upon to give a particular direction, and refused to do so, is sufficient to maintain an exception; for the thing which he was required to do being stated, and his refusal being also stated, the rule that the bill of exceptions must show what his direction was, is complied with: *M'Alpine v. Mangnall*.¹

The distinction between warranty and representation will not avail the assured here, for in the agreement signed at the foot of the proposal and in the policy itself, there is a distinct stipulation that if any "untrue allegation" has been made, the policy shall be void. That was in addition to the warranty, and in addition to the stipulation as to the untruth of material statements. The untruth of these statements, without any restriction as to their materiality, had the effect of avoiding the policy.

THE LORD CHANCELLOR, having stated the pleadings and evidence, said: The learned Judge at the trial held that the plaintiff, in order to recover in the action, was bound to show that the * misstatements were material as well as false. To that * 494 opinion the defendant excepted, and said that the learned Judge ought to have directed the jury that it was sufficient for the defendant to prove that the statements were false. The

¹ 3 C. B. 496.

exception (for though there are several they need only be treated as one) arises upon the ruling of the learned Judge as to the first issue, which is raised upon the plea of *non assumpsit*. That will depend upon the question whether or not the materiality was a matter put in issue or not. The second plea does not clearly raise the question of materiality, it only says that the statements were false. Then the counsel for the defendant said, with reference to that plea, You, the learned Judge, ought clearly to have directed that that was sufficient, for that if the jurors were satisfied the statement was false, the policy was void. · The exception to that is that the learned Judge refused so to direct. But then upon that a very great doubt may be raised whether that is a good exception, because the exception ought to show what error the Judge committed, and stating only that he refuses to direct in the very words of that exception proves nothing (at least this is the argument on one side), because it may be that he directed something that was exactly tantamount to it. The form of the exception is therefore objected to as insufficient.

Now in order to get that information which shall enable the House satisfactorily to decide the whole of this case, I propose to put to the learned Judges these two questions: —

1. Was it necessary for the plaintiff in error to prove on the trial that the answers given by Fitzgerald to questions 21 and 22, contained in the particulars, dated Kilrush, 17th June, 1846, or either of them, were or was material as well as false? And secondly,

2. If it was necessary for the plaintiff in error to prove the materiality as well as the falsehood of the answers, or *either of them, are the exceptions, so far as they relate to the ruling of the learned Judge on the issues joined on the second and third pleas, or is either of them, sustainable?¹

The Judges asked time to consider the questions.

Ordered.

June 4.

MR. BARON PARKE. — Your Lordships have proposed two questions for the consideration of those of her Majesty's Judges who heard the argument of this case at your Lordships' bar.

¹ Sir F. Kelly suggested that, instead of the word "sustainable," the words "sufficient to enable the plaintiff in error to sustain the defence," should be introduced. The suggestion was not adopted.

I have to state, that we have considered with due attention the very able arguments both at your Lordships' bar and in the judgments of the Irish Judges, which are fully reported in the printed cases laid before us, and that we find ourselves unable to agree in the conclusion at which the majority of those Judges have arrived.

The answers referred to by your Lordships were given to two questions put to the assured, Fitzgerald ; the first, whether any of the party's near relatives died of consumption or other pulmonary complaint ? and, secondly, whether the party's life had been accepted or refused at any other office, and if accepted, whether at the usual premium, or with what addition ? To both, the assured answered in the negative. At the end of the list of questions the assured subscribed a declaration to the effect that the particulars should form the basis of the contract between the assured and the company, and that if there should be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to the insurance should not have been fully communicated to the company, or if there should be any fraud or misstatement, all the *money paid on account of the insurance *496 should be forfeited, and the policy should be void.

The first question then submitted to us is, Whether it was necessary for the plaintiff in error to prove on the trial that the above answers, or either of them, were or was material, as well as false ? We are all of opinion that it was not.

This question does not appear to us to turn upon the well-known distinction between warranties and representations laid down by Lord Mansfield, nor upon the point whether the declaration above mentioned was either a part of the contract binding between the parties independent of the policy, or meant to be referred to by it. The proviso is clearly a part of the express contract between the parties, and on the non-compliance with the condition stated in the proviso the policy is unquestionably void.

The case therefore resolves itself, in our view of it, as it does in that of most of the Irish Judges, simply into a question of the construction of the proviso itself ; and it is upon questions of that nature that different minds are apt to differ in their conclusions, however disposed to adopt the established rules for the construction of written instruments.

By that proviso it is stipulated, first, that if the assured should

die on the high seas (with certain exceptions), or should kill himself, or die by duelling, &c., or if any thing warranted as before mentioned (and there were several express warranties before stated) should not be true, or if any circumstance material to that insurance should not have been truly stated or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated to the company, the policy should be void. Thus far the condition applies only to material matters ; but it proceeds to declare, obviously

*497 * with a view of extending the protection to the office still further, that if any fraud shall have been practised on the company, or any false statements made to the company in or about the obtaining or effecting of that insurance, the policy shall be null and void. The latter words probably override the former, and the fraud, as well as the false statement, in order to avoid the policy, must be made in or about the obtaining or effecting of that insurance. These words, no doubt, must be understood not to include a false statement of matters to the disparagement of the applicant for insurance, and tending to render his life less insurable ; such a construction would be clearly absurd, and in no way reconcilable with the manifest object of the proviso. The words, however, will clearly include all frauds or false statements made in order to obtain the policy, whether in matters material or not ; a consistent construction will thus be given to the whole. The proviso, in the first place, provides for the violation of the special matters mentioned in the commencement of it. Next, it requires every material fact not to be misrepresented or concealed, but to be fully and fairly declared. But it goes further. In the anxiety of the company to protect itself by every precaution, it prohibits any fraud or falsehood whatever to be used in obtaining the insurance. It includes all frauds for that purpose, though not made by concealment or misrepresentation, by word or writing, of material facts, such as fraud in false personation, or in the disguise of the diseases of the applicant ; and, lastly, it prohibits every false statement whatever, whether in matters actually material or immaterial, and leaves no room for dispute whether the particular matter to which it related was material or not (which in the case of a dispute a jury would have to decide), leaving the company to determine entirely for itself what matters it deems material and what not.

* This seems to us to be the obvious ordinary sense of the words used, and there is no reason from the context to give any other than the ordinary sense to them, though they are to be construed as the words of the assurers, and most strongly against them if there is any ambiguity in them. There is no ambiguity in them in this respect. A doubt possibly may exist whether the word "false" is to be understood in the sense of false in point of fact, or morally false, though, I believe, most of us think that it is not to be limited to moral falsehood; but there seems to us to be no doubt that if the statements are false, in whatever sense we understand that word, being used in effecting the insurance, this proviso operates. There then appear to us to be only two questions for the jury on this part of the policy: Were the statements false? Were they made in obtaining or effecting the policy? Whether they are material or not is not a necessary part of the inquiry. It has seemed to two eminent members of the Irish Bench, Mr. Justice Moore and the then Lord Chief Justice Blackburne, that the materiality of the question was involved in the inquiry whether it was used by the assured to induce the company to effect the policy. We do not agree with that reasoning. It is true that the materiality of these statements may be sometimes evidence of the purpose with which they were made, and may tend to show that they were made with the object of obtaining the policy, because if immaterial they would not be likely to effect it; but the materiality is not a necessary condition to bring them within the scope of the proviso, if it can be shown that the statements were made in obtaining the policy and for the purpose of effecting it; and here the terms of the particulars and the subjoined declaration preclude all doubt upon that question; for the truth of the answers is, in the strongest terms, made essential to the validity of the policy.

* We therefore answer your Lordships' first question in the negative, notwithstanding the ability shown by the Judges who have expressed their opinion, that the materiality of the answers was a necessary part of the proof.

With respect to the second question proposed by your Lordships, we answer, that the exceptions, on the issue joined on the second and third pleas, are not sustained, and that on a formal ground. The bill of exceptions should have stated what directions the

Judge gave, as it is misdirection, not non-direction, which is the proper subject of a bill of exceptions.

This was determined in the case of *M'Alpine v. Mangnall* (in error).¹ If it had been stated that the learned Judge told the jury it was necessary on those issues to prove the materiality of the answer, the exception would have been well founded. So it would if the ground of his refusal to put the question in that form had been that all the allegations in the plea should have been proved, and that there was no evidence to that effect; because the plea being, in our opinion, good, as the materiality was not essential, the proof of a part, which if pleaded alone and proved, would have barred the action, was sufficient. It would have been otherwise if the plea had been bad, when every part must have been proved in order to sustain it, and obtain a verdict upon it.

July 14.

THE LORD CHANCELLOR, after fully stating the pleadings, the evidence, and the proceedings at the trial, said : The plea upon which the question arises is the old plea of *non assumpsit*, for I need hardly remind your Lordships that the "new rules" of pleading adopted in this country do not extend to Ireland.

* 500 * Now, among the particulars constituting that paper which Fitzgerald signed, and which he agreed should be the basis of the contract between him and the company, there were two questions to which he was called upon to make an answer, and which he did answer. One of them was, "Did any of the party's near relations die of consumption, or any other pulmonary complaint?" To which Fitzgerald's answer was "No." The other was, "Has the party's life been accepted or refused in any other office, and if accepted, was it at the usual premium, or with what addition?" Again the answer was "No." That meant that an insurance on his life had not been accepted or refused at any other office. Striking out all the other articles from those particulars, the result therefore is, that Fitzgerald agrees that the basis of the contract between him and the company shall be that he truly represents to the company that none of his near relations died of consumption, or any other pulmonary complaint, and that his life had never been accepted or refused at any other office.

A great deal of evidence was given to which it is not at all

¹ 3 C. B. 496.

material to advert, and then, when the learned Judge at the end of the case came to sum up, and to direct the jury as to what were the questions to be considered, the counsel for the defendant called on the learned Judge to give this direction, that if the jurors believed that previously to the making of the policy of insurance, any false statement was made to the company by Fitzgerald "in or about the obtaining or effecting of the insurance," although they should believe the same was not material to the insurance, they must find a verdict for the defendant on the issue of *non assumpsit*. The counsel repeated this demand for such a direction to the jury, specifically with reference to the statement as to the refusal of the plaintiff's life at another insurance office, and also to the question whether Fitzgerald * had any relations who had * 501 died of pulmonary complaints; and as to the general and the specific matter thus required to be presented in that form to the jury, the learned Judge refused to give the direction so required. [His Lordship here read the exception, and the allegation as to the form of the direction actually given to the jury.]

I think, my Lords, interpreting this direction with reasonable latitude, we must take it to mean, that if the jurors found Fitzgerald's "proposal" to be false and material, they were to find for the defendant; but that, unless they found it to be both false and material, they were to find for the plaintiff. He considered it to be essential to the defendant's case that the statements should be material as well as false. That direction was affirmed in the Court from which this record now comes.

The important question at present is, whether the learned Judge was right in having directed the jury that, although the statements of the assured as to certain matters were false statements made to the company, in and about effecting the insurance, the verdict must be for the plaintiff, unless those statements were material as well as false.

Although the learned Chief Justice Blackburne came to a conclusion different from that at which the learned Judges now advising your Lordships have arrived, and in which I concur, and in which I am about to propose to your Lordships to concur, yet I think he very distinctly states (and the other learned Judges forming the majority concurred with him) the point on which the question turned. He says: "The plaintiff in error contends that it is sufficient to ascertain, simply in the terms of the policy, that the

false statement was made in or about obtaining it ; and that when this is done, the words of the condition are so comprehensive and stringent, that the question is solved and the policy avoided,

- * 502 whether the statement was material or * immaterial ; in other words, that we are to read the clause as if it had contained those very words. I admit if this be the meaning of the words, — if this be so clearly expressed as not to admit of any other rational construction, — we must give them the operation contended for. But is this so ? It is obvious, that to maintain a defence founded upon this provision of the policy, proof must be made, — first, of the false statement of some matter of fact ; and secondly, that it occurred on the occasion of effecting the policy. The Judge and jury must inquire into both, and decide both." Up to this point I entirely concur with the learned Judge ; he puts the case very distinctly and clearly. He then goes on thus : " What could answer this inquiry, or be said, with any propriety of language, to come within such terms, but a mis-statement used by the assured to induce the company to contract, and how could it have done so if it had been utterly immaterial ? " Now there, my Lords, I differ from the learned Judge. The company stipulates this, that the assured shall contract with the company that he warrants certain things to be correct, and further stipulates that if he should make to the company any untrue statement in and about effecting the policy, such untrue statement shall avoid the policy ; and then the company says that it will not contract with him till he shall answer certain questions which are made the basis of the contract. Among those questions are these two : " Have any of your relations died of pulmonary complaints ? Has an insurance on your life been accepted or refused at any other office ? " The stipulation is, that if he shall not answer these questions accurately, the policy shall be void. That is the interpretation of the contract, which, taking together the policy and the particulars required to be subscribed, appears to me irresistible. The requirement is extremely reasonable. That we need not speculate on ; but the reason for
- * 503 making such * a stipulation is obvious, and is explained by this very case. Whether certain statements are or are not material, where parties are entering into a contract of life assurance, is a matter upon which there must be a divided opinion. Nothing, therefore, can be more reasonable than that the parties

entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy.

Now it appears to me, my Lords, that that is precisely what has been done here. The parties entering into the insurance have so stipulated. "The basis of our contract shall be your answering truly these two questions." There were a great many others ; but, putting those aside, they say the basis of the contract between us shall be that you shall answer truly those two questions, and if you do not answer them truly the policy shall be void. But then, when the trial comes as to whether the plaintiff has made out his right under that policy, the question is, whether the direction to the jury ought not to have been, " You are to ascertain whether what was then stated was untrue, was false ; whatever interpretation may be given to the word 'false,' if it was false, there is no question as to whether it was material or not, the parties having stipulated that if it was false the policy shall be void." The question for the jury to decide was simply whether it was false or not. In that narrow compass the whole case lies.

The learned Judges who decided that the direction actually given was good, proceeded upon the well-known rule of law, that there is a great distinction between that * which * 504 amounts to what is called a warranty and that which is merely a representation inducing a party to enter into a contract. Thus, if a person effecting a policy of insurance says, " I warrant such and such things which are here stated," and that is part of the contract, then, whether they are material or not is quite unimportant, — the party must adhere to his warranty, whether material or immaterial. But if the party makes no warranty at all, but simply makes a certain statement, if that statement has been made *bond fide*, unless it is material, it does not signify whether it is false or not false. Indeed, whether made *bond fide* or not, if it is not material, the untruth is quite unimportant. If the man on entering into the policy had said that he arrived at Dublin three days previously, whereas he had only arrived that morning, and such statement did not form part of the contract, then, though false, it would be quite immaterial. If there is no fraud in a rep-

resentation of that sort, it is perfectly clear that it cannot affect the contract; and even if material, but there is no fraud in it, and it forms no part of the contract, it cannot vitiate the right of the party to recover.

There are several cases, which are collected together in the 1st Vol. of Douglas,¹ in which this principle is well illustrated. But, my Lords, it appears to me that that principle has no application to a case where it is part of the contract, as it is here, that if a particular statement is untrue, then the contract shall be at an end. That distinction appears to me to have been overlooked by the learned Judges, and that oversight has been the ground of that which I must consider to be the erroneous conclusion at which they arrived.

* 505 * My Lords, it is within this narrow compass that the case lies. We had the advantage of the assistance of eleven of the learned Judges of this country. They all took the same view of the case, and they were all of opinion that the learned Judges in Ireland committed an error in supposing that the doctrine of representation, as distinguished from warranty, was applicable to the present case, where the representation is itself included in the contract. They thought that the conclusion at which the learned Judges in Ireland arrived was erroneous. My Lords, in that view of the case I entirely concur. I shall therefore think it my duty to move your Lordships that judgment be given for the plaintiff in error.

LORD BROUHAM.—My Lords, I entirely agree with my noble and learned friend, that this case really lies in a very narrow compass. It depends entirely upon the construction which we are to put upon these words in the policy, “or any false statement made to them,” the insurers, “in or about the obtaining or effecting of this insurance.”

Now, first, there is the warranty. Then, previously to the clause in question, there are these words, “or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed or communicated to the said company, or if any fraud shall have been practised upon the said company”; and

¹ Bean v. Stupart, Dougl. 11, and the cases there collected in the notes; see also Dougl. 284.

then comes this larger, and, as it were, more sweeping clause, "or any false statement made to them"; as if it were, "or any false statement whatever made to them, in or about the obtaining or effecting of this insurance." At first I had some doubt, as the learned Judges appear to have had, with respect to the word "false," whether it implies merely *untrue, or * 506 morally false,— untrue, but not within the knowledge of the party making it, or morally false, that is, untrue within his knowledge. At first, I certainly had an impression upon my mind that it was to be taken as implying morally false rather than merely untrue, and that impression was grounded upon what immediately precedes; for "true" is used in a former part of the document, and "fraud" is used in the immediately preceding clause. I had, therefore, the impression at first that "false" there meant morally false, as contradistinguished from merely untrue. I have since come to the opinion which my noble and learned friend and the learned Judges advising the House have come to, that it does not mean morally false, but that it means simply untrue.

But be that as it may, it is quite immaterial; for whether we take the word as untrue absolutely, or untrue within the knowledge of the party making the statement, in either case, it appears to me, as it has done to the learned Judges, perfectly clear that the two questions to put to the jury were, "Was there an untrue statement made, whether with the knowledge of the party making it that it was untrue, or not?" And, "Was it made in or about the obtaining or effecting this insurance?" According to my opinion, agreeing entirely with that of my noble and learned friend and the learned Judges, those were the fit and proper questions, and the only questions to be put to the jury. And I think, further, that it is matter of exception, and made the direction of the learned Judge liable to exception, that he had directed the jury to consider the materiality of the statements in question. The truth of the statement, it being part of the contract, not its materiality, was in issue. I am therefore of opinion, with my noble and learned friend, that in this case we ought to give judgment for the plaintiff in error.

* LORD ST. LEONARDS.— My Lords, I believe that a more * 507 important case than the present has not come before your Lordships during this session. Because, although the point turns

simply upon the proper construction of the instrument, yet it leads to such important consequences with regard to insurances for life, which are so common in this country, and upon which many persons entirely depend as their security for a provision for their families, that it becomes exceedingly important to consider maturely what is the true construction of an instrument of this sort. It is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken, according to law, more strongly against the person who prepared it. At the same time your Lordships must take care to guard companies of this nature against any fraud, and not to give validity to any part of the contract which has that object. That has been the practice for many years past. The Courts of law, observing how often such companies have been subjected to frauds, have advised them to protect themselves by a sufficient provision against the commission of fraud, and that has led to such stringent provisions as those which we find in this case, provisions which, I am bound to say, unless they are fully explained to the parties will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable portion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written.

In some cases, and it is so in the present, the companies take care to go beyond the law, and to protect themselves by a stipulation that a statement, which is not a warranty but a representation, if made contrary to the fact, shall * avoid the

* 508 policy. At law, if that statement, though untrue, was not untrue to the knowledge of the party who made it, the assured is entitled to recover the sums which he has paid. So that, although provision for the family is not obtained, yet there is no actual damage done to the fortune of the man. He is disappointed in his object, but the money which he has accumulated and paid for the insurance is repaid to the family. This company, however, has taken care that no such consequence shall ensue, but provides that, if any statement within the contract has not been truly made, the man's family shall not only lose the benefit of the policy, but shall not be able to recover a single shilling of the premiums paid, however numerous they may have been.

This, my Lords, is rather a singular case. This company, like

all others of the same kind, started, in dealing with' the assured, by tendering to him certain particulars which he was required to answer, and he was to sign a declaration at the end of them. Questions, twenty-seven in number, were asked, most of them being material. Of those twenty-seven questions, the company, in framing the policy, chose to select fourteen, and to make every one of those fourteen the express subject of a warranty. The others were not included in the warranty. Amongst the questions which are omitted from the warranty, we find that those two very important questions upon which this case has ultimately turned have been omitted. I cannot imagine two more material questions. Supposing them to have been untruly answered, you would look naturally to the policy to see whether they were there ; but the policy has excluded them. The policy takes this shape : it states as many of the questions as the company has chosen to take out of the particulars, and it states them as so many warranties, and then it proceeds upon that warranty to grant * the * 509 policy. The policy begins in these terms : That the assured " hath warranted and doth warrant that his name," and so on, and then it goes through the several terms which the insurers have chosen out of those particulars to constitute what they call their warranty, after which there is the common form of assuring the money. Then comes this proviso, upon which the policy is granted, that in case he should do certain things, such as go abroad, or enter the army or the navy, the policy shall be void. That is all quite right. Then come these important words, making void the policy : " or if any thing so warranted should not be true." There the attention of the assured is drawn at once to the warranty. He reads the terms of the warranty, and he is told that if any thing he has warranted is not true, the policy is to be void. The word " true " there is used, of course, in a general sense, and whether the man knew it to be true or false is utterly immaterial. Whether the circumstances warranted were material, or not, is entirely out of the question. It is simply sufficient, and ought to be sufficient to avoid the policy, that any one thing warranted is not true ; and therefore the word " untrue " there is used in its general sense of an untruth in the abstract. It signifies not whether he did or did not know it to be untrue, it signifies not whether the circumstances were material or immaterial, the contract is to be avoided.

Then follows this, I may say, remarkable clause. Your Lordships will observe, that whenever they begin a new limb of a sentence they begin it with a conjunction. The first is this, which I believe I have already read, "Or if any thing so warranted should not be true." The next is, "Or if any circumstance material to the insurance should not have been truly stated, or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated

* 510 * to the said company." This is all one limb of the sentence, and is all governed by the same words, the first words, "or if any material circumstance." So that all the misrepresentation and all the misstatements which are there guarded against are with reference to some circumstance material to the insurance, "or if any circumstance material to that insurance should not have been," &c. Now, so far again, it is perfectly correct, only it would have been much better if they had inserted among those things which they meant to consider material, the questions they had asked, and which had been answered. It would have led to a better understanding of the contract, if they, as in my opinion they ought to have done, had inserted them. But still the second limb of this sentence is right enough. The first is, that if any portion of that warranty is untrue, the second, if any material circumstance has been untruly stated. If it is material, then its untruth will avoid the contract, although the party did not know it to be untrue. So far I entirely go along with the contract.

Then follow those words upon which so much has turned, and which have led to so much difference of opinion. And I must say that that very difference of opinion between such very learned persons upon such an important case as this, of itself shows the improper manner in which this policy has been framed. A policy ought to be so framed, that he who runs can read. It ought to be framed with such deliberate care, that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it: nothing ought to be wanting in it, the absence of which may lead to such results. When you consider

that such contracts as this are often entered into with men
* 511 in humble conditions of life, who can but ill * understand them, it is clear that they ought not to be framed in a man-

ner to perplex the judgment of the first Judges in the land, and to lead to such serious differences of opinion among them.

The words which have led to this great difference of opinion are these, "Or if," and here begins the last limb of the sentence, which is all governed by the first words "or if," "or if any fraud shall have been practised upon the company, or any false statement made to them in or about the obtaining or effecting of the insurance, this policy shall be void, and the premiums shall be forfeited." Now what does this mean? Nothing can be more simple than the meaning of the first words, "or if any fraud." The provisions before made against untrue statements and other material matters might not hit a great many cases of fraud; there might be personation for example. A great many descriptions of fraud may be in action; there might be many circumstances concurring to a fraud that could not be described, because fraud is a very general term, and it is impossible therefore to particularize beforehand what is meant by fraud. But you know very well what fraud is when it comes before you for judgment. Therefore, if there should be fraud, this policy very properly strikes at it. But the difficulty in which the Judges in Ireland involved themselves was this. They were endeavouring to import the word "material," which is found in the second branch of the sentence, into this third branch. Of course, you could not speak of any thing so absurd as a "material fraud." "If any fraud" stands quite right, if any fraud has been committed, the policy is to be void. Then what is the meaning, in conjunction with those words, of that which follows? Surely, my lords, these "false statements" must mean something which is connected with that which occurs

*in the other branch of this limb of the sentence, namely, *512 "fraud." The company has provided against any untrue statement generally contained in the warranty, and generally, also, against any material misstatement. Then comes "fraud," and fraud may be committed in action without any actual misstatement, and therefore I connect with that "false statement." Now when I find that the contract uses, to express the same thing, two words which may indeed have the same meaning, but which are also open to different senses, I must be very well satisfied, before I apply the same construction to those two words, that such was the intention; for if a proper word is used, and then afterwards a word is used which admits of a different as well as of the same

sense, I should come naturally to the conclusion, if there is nothing in the context to prevent it, that the intention was not to use the second word in the same sense in which the first word was used (or else why not repeat the first word), but to use it in a different sense. Now in what sense is the word "true" employed in the first part? "True" there is used in the general sense; it signifies not whether it is morally true or not. The question is, whether it is true. If it is not true, the consequences follow under this contract; but when I use the word "false" in a sense connected with fraud, what do I mean? I mean not only that which is untrue, but I mean that which is malicious, wilful, which is criminal, which is false in an odious sense, and to the man's knowledge. And therefore the construction which, after a great deal of consideration, I should put upon this part of the clause certainly is, that it refers to a wilful fraud, a wilful misstatement, and that the word "false" there is used in contradistinction to the word "untrue" in the former part of the sentence, and means

a wilful misstatement; and then, connecting that with the

* 513 *subsequent words, a wilful misstatement, as it should be read, "in or about the effecting of the insurance," I think all the mischief will be taken out of this policy, because I think there is no jury having such a case to consider, which would, where a mere impertinent question had been asked of a man and untruly answered, though it might be held to be in and about obtaining the insurance, come to the conclusion that that man had committed wilful falsehood upon such a subject when the statement had not and could not have any material bearing upon the insurance, for it must be a statement "in or about the insurance"; and if the untruth must be wilful, I think that any honest man would be safe, even under this contract, by such a construction.

The question then would be, was this a wilful falsehood in or about effecting the insurance? Supposing it had been some indifferent question which they chose to put to him, and which he had answered, but yet had not answered truly, if the jury felt satisfied that it was a mere impertinent, irrelevant question, the verdict would be in his favour. For, observe, if it is an impertinent or irrelevant question, how likely it is that the assured, the man who is bargaining for his policy, will have his prudence and his caution lulled asleep, and will not be so alive to the duty of answering truly as he would be, meaning to act honestly in regard to matters

which he could not help feeling were essentially necessary to be answered in order to enable the company to form a judgment upon the subject.

I think that your Lordships, and every Court of justice, should endeavour to give such a construction to a policy of this nature as will afford a fair security to the person with whom the policy is made, that, upon the ordinary construction of language, he is safe in the policy which he has accepted. I am quite sure if policies of this nature are * to be entered into, and such *514 doubts are to be raised as have been raised in this case, that that very important branch of insurance, life insurance, will become very distasteful to people, and that no prudent man will effect a policy of insurance with any company without having an attorney at his elbow to tell him what the true construction of the document is. And, indeed, in this case it has been necessary to consult all the Judges in Ireland, and they having decided in one way upon the language of this policy, the Judges of England have been consulted, and they have come to a different opinion.

My Lords, notwithstanding that I have thought it my duty to draw your Lordships' attention to the true construction of this policy, I do not disagree with my noble and learned friend in the motion which he has made, because I think the question was not properly put to the jury as to the materiality of these statements. I think that, in reference to these two questions, for example, whether any of his relations had died of pulmonary complaints, and whether his life had been refused by any other company, the learned Judge ought not to have told the jurors that their verdict ought to be for the plaintiff in error unless they were of opinion that the statements were both false and material. That was a wrong direction. But I think it very important to impress upon companies that they ought not to issue policies in this shape, and I think that they would do well if they were to place the word "wilful" before the words "false statement" in that last branch of the clause. So, if it is their intention to exclude materiality, I think it would be but honest and fair so to state upon the face of their policy, that persons who are really not competent to form a judgment upon such a question may at once, upon the face of the policy, see what risks they run; * for, remember, *515 that the proviso inflicts upon the family the loss not only of the sum assured, but of all the sums, possibly a great portion of

the savings of a man's life, which have been paid for the policy itself.

After all, everybody feels this difficulty. The company is entitled, and is bound to guard itself against fraud, and the Courts have always shown the utmost anxiety to protect companies against fraud, and always will do so. We are not entitled to look at the facts of this case, and therefore I am not using the facts for the purpose of the judgment which I am recommending your Lordships to give ; but the facts of this case were very likely to mislead any one in his judgment. The jury went wrong in this case, and the proper application to the Court would have been to set aside the verdict, and not to have taken exceptions to the Judge's charge. Nothing could have been clearer than that the two questions were material. The jurymen were perverse, and went wrong in bringing in a verdict contrary to the evidence as to the materiality of the questions. What could have been more material than that question, "Has your life been refused by other offices?" It is utterly impossible that any thing could have been more material ; because if it had been answered truly, he would then have been asked, what offices ? He must have stated what offices, and this company would have had an opportunity of inquiring of those offices what were the grounds upon which they had refused him. It seems to have been, so far as we can judge from the evidence, a very proper case for the company to resist. Therefore I am not finding fault with the conduct of the company in this case, but I am drawing your Lordships' attention, which I thought it very material to do, to the terms of the policy. I think

the company was right enough in resisting this claim, but

* 516 I cannot think the company * to be right in so framing a policy. I entirely agree with the motion of my noble and learned friend as to what should be done in this case.

Ordered and adjudged, That the judgment given in the Court of Exchequer Chamber in Ireland, affirming the judgment given in the Court of Exchequer in Ireland, be, and the same is hereby reversed ; and that the judgment given in the said Court of Exchequer in Ireland be, and the same is hereby also reversed ; and that the verdict given by the jury in this case be, and the same is hereby vacated and annulled : And it is further ordered, that the said Court of Exchequer in Ireland do award a *venire facias de*

novo, and proceed according to law; and that the record be remitted to the said Court of Exchequer in Ireland.

Lords' Journals, July 14, 1853.

1853. July 15, 18, 19, 21.

SIR GILBERT EAST GILBERT EAST, Bart., *Appellant.*
SAMUEL TWYFORD and another, *Respondents.*

*Estate,—in Tail; for Life. Executory Trust. "Inherit." "Son."
"Grandson."*

Where an estate for life is given by clear words, the mere imposition of a charge on the tenant for life will not have the effect of enlarging the estate.

A testator, by a will written on the pages of a small note-book, divided his property into three classes, marked No. 1, No. 2, No. 3. He devised these classes of property to persons designated by letters. The order of "succession" was marked in one page (54) of his will. This page contained the words "The eldest and other sons to inherit before the next letter." The persons designated by the letters were all named in a card, which was referred to in the will, and which card was with the will admitted to probate. K was the testator's wife, to whom was given an estate for life in all the classes of the property. The will required implicit obedience to certain orders of the testator on the part of "the individual first to inherit after K"; and if not, "the property aforesaid set down and particularized in No. 1 to go to M, if not to L, and afterwards to his eldest lawfully begotten son, &c." There were similar expressions with regard to N and O. The card showed that these two letters were intended for the eldest sons of two nephews, but who were then unborn. The property No. 1 consisted of very large sums in stock, which the executors of the will were to invest in the purchase of real estate; and in page 54 L was named as the person to take No. 1 after the life estate of K. A grandson was "to inherit before the next-named in the entail or any one of his sons." Class No. 2 consisted of a small estate in land, and by page 54, O was, as to that, to succeed to K, and the estate there given to O was expressly a life estate, with *remainder to his eldest and other sons in tail male; and it was *518 there also said "a grandson legitimate shall inherit before a younger son." Class No. 3 consisted of certain estates in Suffolk; the "succession" there was (page 54) "first to K then to M," and the devise (page 47) was "first to K and then to M, and afterwards to his eldest legitimate son, and then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male; if he have, it will go to him, and so on to

the other sons in like manner. After the decease of K, I repeat, I bequeath all the property aforesaid to M and his heirs male, in the manner aforesaid, as in the case of L, &c., at page 2, and I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions":—

Held that, reading all the parts of the will together, L only took a life estate in No. 1, with remainder to his eldest and other sons in tail male:—

Held, also, that this was not an executory trust.

The Court of Exchequer, on an information filed by the Attorney-General for legacy duty, had held that L took an estate tail. On a bill to carry into effect the trusts of the will, the Vice-Chancellor held that L took a life estate only:—

The Vice-Chancellor's decision was affirmed; but as the testator had himself created the difficulty, the costs were ordered to come out of the estate.

Meaning of words "son," and "grandson," and "inherit."

THIS was an appeal against a decree of Vice-Chancellor Turner, pronounced in July, 1851, in a suit instituted to obtain the decision of the Court on the construction of the will of Sir Gilbert East, who died on the 11th of December, 1828. The testa-

* 519 tor made his own will in the pages of * a parchment-covered book, and designated his intended devisees and legatees by letters. The explanation of the meaning of these letters was given on a card. The book and card were admitted to probate, as constituting the will of the deceased. In the course of the suit, it was determined that the persons thus designated in the will were duly ascertained by the card.

In the first page of the book, which was dated 10th January, 1819, the testator said: "I hold forth to the direst execrations and infamy any person endeavouring to alter or overset, by suffering a recovery, by any Act of Parliament, or in any other way, these directions herein set down; and further, that if the injunctions and directions in No. 1¹ be not most fully and rigidly adhered to in every respect by the individual first to inherit [2]² after K, and therein set down, that then I order and bequeath the property aforesaid set down and particularized in No. 1 to go to M, if not to L, and afterwards to his eldest lawfully begotten, son, &c., on the sole condition of their fully and unequivocally conforming to

¹ The testator, at p. 54, divided his property into three classes, and marked by letters the individuals who were to take any interest in each class. These letters were explained by the card, which expressly referred to p. 54.

² The figures printed in this report in brackets designate the beginning of each page of the book. There were several blanks in the will, all of which are marked in the parts here quoted. The pages were very irregularly filled up.

the conditions therein set down, but not otherwise ; and if he or they shall not in every respect and tittle conform thereto, then and in that case I leave and bequeath the property aforesaid in No. 1 to N, and at his decease to his eldest legitimate son, &c., and in case he * or they shall not in like manner rigidly * 520 and fairly comply with these conditions in No. 1 set down, then I bequeath the said property to [3], and at his decease to his eldest legitimate son, &c. Now in case of his or their non-compliance in every respect to the conditions set down in No. 1, then the said property shall go to O, and at his decease to his eldest legitimate son, &c. ; but still only if he and they do unconditionally comply with its orders and directions. In case of the decease of an eldest son in any of the above-named cases, or in any subsequently named, then the property in No. 1 shall go to the second legitimate son, and so on, according with primogeniture ; but it is my will and order, that in every case a grandson shall inherit before the [4] next named in the entail, or any of his sons. If or his sons shall not comply with the terms here specified most particularly, the property set down in No. 1 shall go to P, and at his decease to his eldest legitimate son, &c. And again, in case of non-compliance in the last named, or any one of his sons who may be entitled to inherit by the conditions of this will, I in that case bequeath the property set down in No. 1 to Q, and then to V and his eldest son, &c., after his decease ; and if neither he nor they, nor any one individual herein set down or designated, though unborn, shall fully bind himself or themselves to adhere to its conditions [5] unequivocally, then and in that case I hereby bequeath all the property set forth in No. 1 aforesaid, to increase the funds of my almshouse, &c." [7] "At my decease I leave the appropriation of all dividends arising from," naming the stocks, "to K for h natural life, and afterwards I request R and his heirs, &c., and S and his heirs, &c." the executors, "to proceed directly to lay out in one or more freehold estates, all the above-recited stocks, in England, but * no- * 521 where else." [10] "It is my will and direction that the succession of inheritance to all this property set forth in this No. 1, at the decease of each person, as it may happen, in possession, shall be in every respect and way the same as in the case of non-compliance with the conditions herein stated." In [11] the testator required that every person taking the property bequeathed in No. 1

should take the name of Gilbert East, and the arms, motto, and crest of his family, "under penalty of the whole of this property in No. 1 bequeathed going to the next to inherit as before set down." In [13] he described the property No. 2, an estate at Fifield, which he bequeathed "to K for life, and then to O for life, and then to his eldest legitimate son, and afterwards to his other sons, if the eldest have no issue male; it being my will and intention in this, as well as in the cases set down in No. 1, that a grandson legitimate shall inherit before a younger son." In [14] the testator provided that if O should die "without issue male," Fifield was to go to N "for his life, and then to his eldest son," and in case of no male issue, "to M for life only, and then precisely as before directed to his eldest, and other sons after the eldest," and if no issue male, "to Q and his eldest son," and so to W "for his life and his eldest son." In [15] the testator declared that he disapproved of Fifield being sold "on any legal contingency occurring," and no timber was to be cut "save only for necessary repairs, and ornamental timber not even for that purpose." There were then annuities for the maintenance of his dogs and horses, and a favourite parrot, and legacies for servants, and in [23] he declared that "the person first entitled to receive my property set down and detailed in No. 1 at p. 7 of this book shall be my residuary legatee." The pictures were to go "to the individual [25] actually in possession of the * property set down and bequeathed in No. 1 and to go as heirlooms, to be inherited by each one in succession as hereinbefore particularly described, as to succeed to the property bequeathed in No. 1." In [33] was the following bequest: "I leave unto *II*, I leave unto *T*, both nieces of Lady East, to each one 3000*l.*; and also to each one 200*l.* per year for their lives, to be paid by the person in possession of my property set down at No. 1 and p. 7 of this book, on my decease, independent of any coverture." In [34], dated Dec. 4, 1819, he said, "Whereas by the decease of my father, Sir W. East, Bart., which occurred on Oct. 12, 1819, and by my right to inherit all his freehold lands unbequeathed, the following lands belong to me and are in my power to dispose of; and I do hereby dispose of them as follows, to wit, that they do go to the persons successively described in No. 1 and at p. 7 of this will, and on the same terms and injunctions in every respect as have been heretofore particularly set down." In [35], dated 11th January, 1820,

* 522 vidual [25] actually in possession of the * property set down and bequeathed in No. 1 and to go as heirlooms, to be inherited by each one in succession as hereinbefore particularly described, as to succeed to the property bequeathed in No. 1." In [33] was the following bequest: "I leave unto *II*, I leave unto *T*, both nieces of Lady East, to each one 3000*l.*; and also to each one 200*l.* per year for their lives, to be paid by the person in possession of my property set down at No. 1 and p. 7 of this book, on my decease, independent of any coverture." In [34], dated Dec. 4, 1819, he said, "Whereas by the decease of my father, Sir W. East, Bart., which occurred on Oct. 12, 1819, and by my right to inherit all his freehold lands unbequeathed, the following lands belong to me and are in my power to dispose of; and I do hereby dispose of them as follows, to wit, that they do go to the persons successively described in No. 1 and at p. 7 of this will, and on the same terms and injunctions in every respect as have been heretofore particularly set down." In [35], dated 11th January, 1820,

with the view of correcting an omission in the foregoing pages, he said, "any legitimate issue I may have shall inherit next after K and before L and all the rest, all my property set forth in Nos. 1 and 2, and at pages 7 and 13 of this will, as follows, I leave these properties aforesaid to my eldest son, and all other my sons, in order of primogeniture; provided my eldest son have no issue male; and hereby entail them in my family to the utmost extent the laws of England will admit: but in failure of issue male, I leave all the properties aforesaid bequeathed in Nos. 1 and 2, and in pages 7 and 13 of this book, containing my will, to my eldest daughter, and other daughters after her, in order of primogeniture, and to their heirs male." He then directed the purchase of the great tithes of Witham, in Essex, and in [42] said, when the * purchase shall have been made, "I hereby will and * 523 direct that they form part of the entail in every way and respect as the other property set down in No. 1 and at p. 7 of this book and of my will."

The testator then proceeded to dispose of his Suffolk property, and certain houses, freehold and leasehold, in Middlesex, which [46, 47] he said, "I bequeath first to K, then to M, and afterwards to his eldest legitimate son, and then to his other legitimate sons, in order of primogeniture, provided, but not else, the eldest have no issue male; if he have, it will go to him, and so on to the other sons in like manner. After the decease of K, I repeat I bequeath all the property aforesaid to M and his heirs male in the manner aforesaid; as in the case of L, &c., at p. 2; and I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions; and again, in failure of issue male legitimate, I bequeath [48] the property aforesaid to O and his heirs male, and next to L, all under the same rules and injunctions in every respect." His house in London he bequeathed [50] to K, or if she should die before him to M or to N. "with this distinction that it be settled on their heirs male."

The 54th page was in the following form: —

* 524 "Succession of property in this my will set down at No. 1
and p. 7 of this book :—

"Marked * This corresponds with the card :—¹

"First to K.

"Then to

"Then to L.

"Then to M.

"Then to N.

"Then to O.

"Then to P.

"Then to Q.

"Then to V."

The eldest and other
sons to inherit before
the next letter.

¹ The card was in the following form :—

FRONT OF THE CARD.

This is a Key & Index to the red letter initials entered in a Parchment covered Book 6½ inches long and 4 inches wide & thus marked on the back Δ; & containing my Will — Nota Bene the Pencil entries are as valid as the Ink — This corresponds with page 54 of y^e Will.

K ... signifies *Eleanor Mary East*

L ... signifies *Gilbert East Clayton*

M ... signifies *second son of William Rob^t Clayton*

N ... signifies *eldest son of Richard Rice Clayton*

O ... signifies *eldest son of Augustus Philip Clayton*

P ... signifies *eldest son of William Tonge*

Q ... signifies *William Capel Clayton*

R ... signifies *Samuel Twyford*

S ... signifies *Samuel Girdlestone*

T ... signifies

V ... signifies *Gilbert East Jolliffe*

W ... signifies *eldest son of John Lloyd Clayton*

X ... signifies

Y ... signifies

Signed by me GILBERT EAST January 30. 1828.

* The "succession of property" relating to Fifield and to * 525 the Suffolk property, and Middlesex freehold and leasehold houses, was in each case marked in the same way.

The testator died on the 11th December, 1828, without issue, leaving Mary, the wife of Sir W. Clayton, his only sister, and heiress at law. The appellant is the eldest son of her second son. Her first son succeeded to his father's baronetcy, and her second son took the name of East in addition to his own. In 1829, the testator's widow instituted a suit in the Court of Chancery to administer the estate. She died in 1838; the suit was revived, and under various orders a sum of 232,291*l.* was raised out of the funds standing to the account of the property No. 1, and invested * in the purchase of real estates, which were con- * 526veyed to the executors for the purposes of the trusts of the will.

By an order of Lord Chancellor Cottenham, made on the 17th of December, 1841, it was declared that the appellant became, immediately upon the decease of the widow, entitled in possession

BACK OF THE CARD.

This is a Key & Index to Legacies &c. bequeathed by me in the Book, on the other side hereof particularly explained.

- II .. signifies *Eleanor Julia Anne Raitt*
- T .. signifies *Henrietta Charlotte Raitt*
- Φ .. signifies *Martha Hack*
- Δ .. signifies *Thomas Gibbons*
- Θ .. signifies *Richard Keeley*
- Z .. signifies *George Hanmer Leycester*
- ↙ .. signifies *Sarah Story spinster*
-

Signed by me GILBERT EAST January 30. 1828.

for his own use and benefit to the rents and profits of the several estates which had been purchased with and out of the testator's property No. 1 ; but such declaration was not to be deemed or taken to prejudice the question whether he became so entitled as tenant in tail or tenant for life only.

The appellant attained twenty-one on the 12th of November, 1844, and by a disentailing deed, dated the following day, and duly enrolled, the estates so purchased as aforesaid were conveyed by the appellant to Charles Reynolds Williams, his heirs and assigns, freed from all estates tail of the appellant in the same, and all estates, rates, titles, interests, and powers to take effect after the determination or in defeasance of the same estates tail, to the use of the appellant, his heirs and assigns, for ever.

By an order of the 18th of March, 1845, the appellant was let into possession of the estates so purchased aforesaid, and certain heirlooms were directed to be delivered to him.

In 1849, the Attorney-General instituted a suit against the executors for the recovery of the legacy duty payable in respect of the property, No. 1, and the Court of Exchequer in that suit declared that the appellant took an estate in tail male in the estates purchased therewith, and that the duty was payable on that footing ; it was paid accordingly. No duty would have been payable if the appellant had taken an estate for life.

In May, 1850, the appellant filed a supplemental bill in the * 527 Court of Chancery against the executors and others * (one of whom was his son Gilbert Aug. G. East, who was born on the 25th of April, 1846), which set forth the former proceedings, and prayed that the appellant might be decreed to be entitled, as against the said defendants thereto, to the benefit of the said suits and proceedings, and the several decrees and orders therein ; and that it might be declared that, according to the true construction of the will of the testator, the appellant became and was entitled to an estate in tail male, in possession, in the estates purchased with or out of the said testator's property, No. 1 ; and that it might be declared that he was absolutely entitled to the goods, chattels, and heirlooms, delivered to him under the said order of the 18th of March, 1845 ; and that the executors might be directed to convey such purchased estates to the appellant in fee simple, as entitled thereto, in equity ; under the said disentailing assurance of the 13th of November, 1844, and for general relief.

The cause was heard before Vice-Chancellor Sir G. J. Turner, on the 11th of June, 1851, and two following days; and judgment was given on the 5th of November, 1851, when the Court, being of opinion that the appellant was only tenant for life of the estates, the bill was dismissed.¹ The present appeal was brought against that decree.

Mr. Rolt and *Mr. Bates* for the appellant.—The estate to which the appellant is entitled is an estate tail. The use of the word “succession” affords a strong argument to that effect. The Courts must ascertain the intention of the testator as to each devisee. With respect to K, there is no difficulty upon that point, for in p. 7 the testator expressly says that he gives it to K for her *natural life. That expression itself justifies the *528 argument that when the testator wished to create an estate for life he knew the clear and express words by which to create it, and his omission of those words in other places shows the existence of a different intention. He applies no such words to L, M, N, or any one of the subsequent devisees. Then what is the estate which L is to take? It must be something less than a fee simple, for M is to succeed to L; but it is more than an estate for life. The key to the difficulty is to be found in the words “the eldest and other sons to inherit before the next letter.” The word “inherit” shows the nature of the interest. The father is the *stirps*, — the sons inherit from him, and must inherit the same estate that he possessed.

[LORD BROUGHAM.—The word “inherit” is only used as to the sons.]

That is so. Then seeing that the testator meant to dispose of the whole inheritance, the word is applied as a word of succession. In addition to that it must be remembered that N and O, when the will was made, were unborn, and the testator knew that, and he knew he could not give an estate for life to their sons; whereas, if he gave estates tail to L, M, N, and O, in succession, then whoever was living, when one failed, could take his estate. *Robinson v. Robinson*² is the leading case on the subject. There the devise was to “L. H. for and during the term of his natural life, and no longer, provided he alter his name and take that of Robinson, and live at my house of Bochyn; and after his decease, to

¹ 9 Hare, 713.

² 1 Burr. 38, 2 Ves. 225, 3 Atk. 736.

such son as he shall have, lawfully to be begotten, taking the name of Robinson, and for default of such issue" over. The Court of King's Bench certified that "L. H. must by necessary implication, to effectuate the manifest general intent of the

* 529 * testator, be construed to have taken an estate tail male."

That decision was affirmed in the House of Lords.¹ It has recently been discussed and approved of in *Montgomery v. Montgomery*.² *Crozier v. Crozier*³ is to the same effect, and the same principle was acted on in *Lewis v. Puxley*.⁴ In the last case the words were, "to my eldest son John, for his life, and to his eldest legitimate son after his death"; and those words were held to give an estate tail.

[LORD ST. LEONARDS.— That case depended on the terms of the gift over. The word "son" was considered as *nomen collectivum*.]

There the general intent was considered, and "son" was treated as meaning issue male. *Mellish v. Mellish*⁵ is almost identical with the present case. There the word "son" was held to describe a class. In *Wight v. Leigh*,⁶ in like manner, a devise to A., and after his death to his first and other sons, and in default of male issue then unto his eldest and other daughters and their heirs male for ever, was held to create an estate tail in A. In *Evans v. Astley*,⁷ Lord Mansfield treated the direction that those to whom the estate should come, and their descendants, should take the name and arms, as showing that the testator meant to devise a descendible estate. *Dubber v. Trollop*⁸ proceeds on the same principle.

Then as to the proviso as to non-compliance with the directions in the will. The first remarkable thing is that if the first taker is only tenant for life, he may by his omission to comply with

* 530 these directions destroy the estate of the * next purchaser, the person whom the testator calls "the next in succession," "the person to inherit." So that the non-compliance of L, the tenant for life, would not only forfeit his own estate, but the estate of the succeeding tenant for life. That cannot be according to law, and the existence of a proviso with such a consequence shows that the person through whose act it is to operate must be pos-

¹ Nom. Robinson *v. Hicks*, 3 Brown, P. C. 180.

² 2 B. & C. 520.

³ 3 Jones & L. 47.

⁴ 15 Ves. 564.

⁵ 3 Drury & Warren, 373.

⁶ 1 W. Bl. 521.

⁷ 16 M. & W. 733.

⁸ Cas. Temp. Hardw. 160.

sessed of an estate of inheritance. Here, too, the testator speaks of "inheritance", and says that the persons who take are to "inherit"; phrases which are sufficiently clear to express his meaning, and which alone, in *Wood v. Baron*,¹ were held to create an estate tail in favour of the person as to whom they were used. Then it is contended, on the other side, that the introduction of grandsons showed that the testator made the son the *stirps*, and that the inheritance commenced with the grandsons, because grandsons is of itself a word of inheritance. But the word "son," as well as grandson, may be a word of limitation. It depends entirely on the manner in which the word is used. The next person named in the entail is the next letter in the order and line of succession; but that next letter describes another of the *stirpes*, for every letter is a *stirps*; and it is to be remarked, that throughout this will the testator used the words "sons" and "issue male" without making any distinction between them; and in page 15, in giving the orders about cutting timber, he expressly puts all the estates on the same footing.

The testator's intention is again shown by the provision for the payments of the 3000*l.* and of the annuities of the 200*l.* to be made to the two ladies mentioned in page 33. He could not have charged such large payments, and especially annuities, on the estate of a mere tenant for life, and * this charge, *531 therefore, points strongly to the conclusion that the person who was intended to bear it was to have an estate of a much more permanent and beneficial character.

The third devise relates to the Suffolk property. That formed the foundation of the judgment in the Court below, that the devise was an estate for life to M, with remainder to his eldest legitimate son, and then to his other sons. That was taken as an indication of what was intended with regard to L as to the other property; but, in the first place, it is not clear that M there took only a life estate, for the property is bequeathed to "M and his heirs male." If M took more than a life estate, the argument raised on the Suffolk devise is at an end; while, if he only took a life estate in the Suffolk property, it by no means follows that L's interest was so limited with respect to the other property. There is a reference to the devise to L, but there is nothing to say that the devise to M was to be taken as controlling, or even explaining

¹ 1 East, 259.

and defining, the previous devise to L. The first devise would rather regulate the second than the second would regulate the first. The phrase "heirs male" is an inflexible phrase of limitation, and must be so construed here. Then the rule laid down in *Fetherston v. Fetherston*¹ applies, namely, that where by plain words in a will an estate tail is given, it cannot be cut down to a life estate unless there are other words equally plain which show that the testator used the former as words of purchase only, contrary to their ordinary sense.

It was argued in the Court below, that this was an executory trust as to land to be purchased, and that the Court might therefore direct the execution of the conveyance according to equitable

rules ; but that doctrine only applies to a case where the * 532 testator has not, in terms, * pointed out what he intended should be the course of limitation, and has not made himself, as in the case of *Lincoln v. Newcastle*,² his own conveyancer. *Papillon v. Voice*³ is an authority to the same effect. Here the testator has passed a solemn execration on the man who should endeavour to overset his will, and by that he showed his intention that the very terms of his will were to be strictly followed ; so that he must be taken, in the language of the cases, to be his own conveyancer.

In the Court below, the Vice-Chancellor sought to get rid of the difficulty of construing the word "son" as a word of purchase, and the word "grandson" as a word of limitation, by saying that "that argument rested on a technical basis, and that this will must not be looked at with a technical eye," and then he went on to say that the testator had himself shown that he knew how to limit a life estate. That is the argument on which the appellant relies, contending that the testator's intention here is sufficiently marked, and that there can be no doubt of that intention being to create a tenancy in tail. *Vanderplank v. King*⁴ is not directly applicable here, and its authority must now be considered as impeached by that of *Monypenny v. Dering*.⁵

Mr. Malins and *Mr. Kent* for the respondent.—It may be admitted that in some devises the word "son" must be read as a

¹ 3 Clark & F. 67.

² 12 Ves. 218.

³ 2 P. Wms. 471.

⁴ 3 Hare, 1.

⁵ 16 M. & W. 418, 434.

word of limitation, for otherwise the intention of the testator would be defeated. But here the intention of the testator requires that that word shall not be so read. He desired to tie up the property in strict entail as long as the law would permit, and this desire existed with respect to every part of the property. In *order to effect this object, he postponed the *533 vesting of the estate tail to the latest possible moment. The property was to be inalienable for one generation at least. His intention would be defeated by making the first taker tenant in tail, for he might then suffer a recovery, shoot the horses and dogs, not take the family arms, and break all the other injunctions of the will, and yet continue to hold the property. The appellant is tenant for life only, with remainder to his first and other sons in tail male. On the failure of any one of the sons the next person is to succeed, or, as the testator says, to "inherit." That word means to "take," nothing more. The use of it in the first page proves that. He speaks of the consequence that is to follow if his injunctions are not rigidly adhered to "by the individual first to inherit" — after whom? — "after K." But K was the testator's wife, who, beyond all question, had only a life estate, and the word "inherit," as applied to the person to come after her, is therefore absurd, if its strict technical meaning is to be given to it. It is used in the sense of, and as equivalent to, "take," in the other parts of the will, and it is so especially with regard to L, and to his eldest lawfully begotten son, in the second page of the will, and the same condition of rigidly adhering to the injunctions of the will is there imposed upon the devisees. If the question was to be determined solely on page 2, with reference to the explanation at page 54, it might be difficult to contend that L did not take an estate tail male; but those parts of the will are not to be construed alone, but must be taken in conjunction with the rest. If construed by themselves, they might come within *Robinson v. Robinson*¹ and that class of cases. As it is, that case is not applicable.

In the construction of page 2 the " &c." is not to be disregarded. "To his eldest lawfully begotten son, &c." *534 The words "eldest son" cannot, without great aid from the context, be made words of limitation. *Doe d. Burrin v. Charlton*.²

¹ 1 Burr. 38, 2 Ves. 225, 3 Atk. 736; 3 Brown, C. C. 180.

² 1 Man. & G. 429.

The word "son," used in this manner, has its meaning well explained in Mr. Baron Alderson's judgment in *Mosley v. Lees*,¹ where it was said that "son" was emphatically a word of purchase, and if other parts of the will did not prevent its receiving that construction, must be so treated. It is after the succession by L that the limitations are introduced, and it is remarkable that when the son of a living parent is spoken of the " &c." is introduced. The issue male are the first persons who are, strictly speaking, to inherit. The second son is not to succeed unless the first son shall die without issue male. The grandsons were to be the *stirpes*, and in that respect this case differs from that of *Raggett v. Beaty*,² where the word "child" was held to mean issue generally, a decision that was avowedly arrived at only under the peculiar circumstances of that case. The 13th page here removes all difficulty, for there each taker, first K and then O, is expressly made tenant for life.

[LORD ST. LEONARDS.—That devise relates to another estate and different persons.]

But in the latter part of the will the same intention is expressly manifested with respect to all parts of the property.

In the Suffolk property, again (pages 46 and 47), the gift is "first to K and then to M, and afterwards to his eldest legitimate son." There it is clear, beyond all doubt, that M only takes an estate for life, *Meure v. Meure*;³ and though, in repeating the devise, the testator says "to M and his heirs male," which

* 535 might possibly raise a doubt,* the addition of the words, "in the manner aforesaid," removes all the doubt; and

when he goes on to add that "this mode shall prevail throughout the whole entail," he does not say any thing which would confine it to the Suffolk property alone, which was in fact but a very small portion of his general estate; but he expressly means to include every part of the property devised under his will.

In *Mellish v. Mellish*,⁴ the Court read "son" and "daughter" as importing the whole line of issue; but that was expressly because the circumstances showed that, if not so read, the estate would go out of the family, and the real and undoubted intention of the testator would be defeated. The decision in *Wight v.*

¹ 1 Younge & C. Exch. 595.

² 2 Atk. 265.

³ 5 Bing. 243.

⁴ 2 B. & C. 520.

*Leigh*¹ proceeded on the same principle. But in *Doe d. Gallini v. Gallini*,² the words were too powerful even for a general expression of intention to affect them, and the will being in terms very like the present, the first takers were held entitled only to a life estate. In *Key v. Key*,³ a recent case before the Lords

¹ 15 Ves. 564.

² 5 B. & Ad. 621, affirmed on error, 3 A. & E. 340.

³ Samuel Key v. James Key, Francis Key, and John Reeve. — John Key, of Lincoln, being seised of an absolute estate of freehold at Ashby Tolville, made his will, dated 2d November, 1784, duly executed and attested to pass real estate, and inserted in it the following devises and bequests: "I give and bequeath unto Samuel Key, son of my cousin Thomas Key, all that enclosed estate lying and being within the parish of Ashby Tolville, and for and during his own life, charged with the following annuities, viz. &c. to be paid to each of them out of the rents and profits yearly and every year during their natural lives, on the, &c. But in case the aforesaid annuitants, or any of them, shall survive the said Samuel Key, I then give and bequeath the aforesaid estate at Ashby Tolville unto the eldest surviving son of the said Samuel Key, charged with the aforesaid annuities; but in default of issue male, I give and bequeath the above demised premises unto his brother Thomas Key, charged in like manner with the aforesaid annuities, and unto his eldest surviving son, on the same conditions; but in default of issue male, my will is, that the aforesaid demised premises do descend unto my heirs at law, charged, &c." There was a gift of residue to Samuel Key, the defendant.

John Reeve was the eldest grandson of the testator's only sister and heiress at law, and claimed as heir at law of the original testator.

Samuel Key entered into possession of the lands, and all the annuitants died in his lifetime. He died in 1835, leaving John Key, of Fulford, his eldest son, and Samuel Key, his second son, and other children. John Key survived his father, and entered into possession of the estates. Long before his father's death, namely in 1824, he made a will, by which he gave all his freehold lands and hereditaments to his father and brother, and two other persons, in trust, to sell the same, and convert into personal estate. He married, and his widow was Jane Key, one of the defendants, and he had issue John and Jane, who died infants, in the lifetime of their father, and Frances, one of the present defendants. Samuel Key, the plaintiff, was the second son of Samuel Key, the first devisee, and was heir male of his father.

Jane Key the widow, and Frances Key the daughter, of John Key of Fulford, contended that the said John Key became entitled, on his father's death, to an absolute inheritance, in fee simple, to the Ashby Tolville estate, and that the said estate was vested in Samuel Key (the plaintiff), upon the trusts declared in the will of John Key of Fulford, concerning his real estate, and Jane Key claimed dower thereout.

Samuel Key, the plaintiff, contended that the estate did not pass to him by the will of John Key of Fulford, but was limited by the will of John Key of Lincoln, the original testator, to Samuel Key (his devisee), for an estate in tail

*536 *Justices, the same conclusion was arrived at. *Wight v. Leigh*¹ has been cited on the other side; but the reason

*537 *of the decision there was, that there appeared a general intention in favour of issue male, and that that intention could only be effectuated by the construction of the will adopted in that case. The general intention here not only does not require to be effectuated, but will actually be defeated, by giving the first takers an estate tail; so that that case is an authority in favour of the respondents. *Meure v. Meure*² is in point. There it was held that though a gift to one for life, and to the heirs of his body, creates an estate tail, a gift to one for life, and after his death to the issue of his body, merely creates a life estate in the first taker. That is in effect what has been done here. *Austen v. Taylor*³ seems to be the other way; but there the land was so devised as to give the plaintiff an estate tail, and the other land which was to be purchased with the money devised was subjected to the same trusts. Then it is said that here two of the classes mentioned in the card, N and O, were unborn at the time of the will; that they, therefore, could not take a life estate only, for then the intention of the testator in favour of their issue male would be defeated; that consequently they must be construed to be tenants in tail, and that L being, like themselves, the first of a class, must be construed to take a like estate. But admitting the difficulty of treating N and O as tenants for life only, the consequence contended for would not follow. The Court, looking at the intention of the testator, would apply the *cy pres* doctrine, and thus effectuate his intention as near as the rules of law would permit. *Vanderplank v. King*,⁴ *Hopkins v. Hopkins*.⁵ The former of these cases is not impeached in *Monypenny*

male; and that he, the plaintiff, had become entitled, as issue in tail male, to the said estate.

The Lords Justices (7th May, 1853) held that Samuel Key took an estate tail male in the Ashby Tolville estate, and that the plaintiff had entered thereto as tenant in tail male in possession, subject to the right of Jane Key to her dower thereout.

¹ 15 Ves. 564.

² 2 Atk. 265.

³ Ambler, 376. See Lord Eldon's observation, *Green v. Stephens*, 17 Ves. 76 and *Austen v. Taylor*, as reported in 1 Eden, 361, and the note at 369.

⁴ 3 Hare, 1.

⁵ Cas. Temp. Talb. 44.

* v. *Dering*,¹ but is merely shown to be inapplicable to the particular circumstances which there existed. *538

This is an executory trust, and the Court will therefore carry it into execution so as best to effectuate the intention, but according to the settled rules of equity. *Baskerville v. Baskerville*,² *Jervoise v. The Duke of Northumberland*.³ In such a case especially, the Court will not imply an estate tail. *Lord Glenorchy v. Bosville*.⁴ In *White v. Carter*,⁵ there was a devise to trustees of money to be laid out in land, and to be settled as counsel should advise, on trust for A. and his issue in tail male, to take in succession and priority; and the interest of the money till laid out was to be paid to A., his sons, and issue: it was held that A. only took an estate for life in the lands to be purchased. In *Humberston v. Humberston*,⁶ where there was an attempt at a perpetuity, the Lord Chancellor said that, so far as was consistent with the rules of law, the will must be complied with; and he executed it by giving to all the sons then alive estates for life, and to the eldest sons unborn estates tail. In *Papillon v. Voice*,⁷ which was a most remarkable case, the Lord Chancellor distinguished between a legal estate in land and the executory trust of laying out money in the purchase of land, so as to hold that the party was in the one case tenant in tail, and in the other tenant for life.

But it is not absolutely necessary for the purposes of the respondent to contend that this is an executory trust, for the Vice-Chancellor, treating it as a trust executed, still thought there was enough to satisfy him that the appellant * was *539 only tenant for life. There are some curious expressions in this will, which show very distinctly the intention of the testator. Thus, at page 16, he speaks of the person who is to provide for the dogs "for his life." Again, when speaking of suffering a recovery, he says not "by Act of Parliament," which plainly points to a tenant for life, for a tenant in tail would not want an Act of Parliament to suffer a recovery. And if any argument is to be drawn from the fact that, in one part of the will, the testator has expressly given an estate for life, thereby showing that when

¹ 16 M. & W. 418.

⁴ Cas. Temp. Talb. 4.

² 2 Atk. 279.

⁵ 2 Eden, 366, affirmed Ambler, 670.

³ 1 Jacob & W. 559, 570.

⁶ Prec. in Chan. 455, Gilb. Eq. Cas. 128, 1 P. Wms. 332.

⁷ 2 P. Wms. 471.

he meant to create such an estate he knew how to do so, that argument becomes destructive to the appellant, for in page 35 the testator expressly gives to his own issue estates in tail male, thereby showing that, when he wished to create such estates, he knew how to use apt words for the purpose. Again, if the description at page 54 puts all the parties there named in the same state, with whom does that line or that description of persons begin? It begins with K, who confessedly takes only a life estate.

Both upon the clear intention of the testator, and on the legal construction to be given to the terms employed in the will, the judgment of the Court below must be affirmed.

Mr. Rolt, in reply.—There is no general intention in this will apart from the clear limitation of the property. But there is a general intention stated in page 54, which it is admitted must, if it stood alone, create an estate tail. There is nothing in any other part of the will which impeaches that intention. In no one instance can the devise to any other person be put on the same footing as the devise to K, for she is expressly made tenant for life only. The cases of *Robinson v. Robinson* and *Mellish v. Mellish* are decisive of the present. There is no authority for construing grandson, any more *than son, to be a word of limitation. The person "next named in the entail" means the next letter named. *Wight v. Leigh* and *Key v. Key* are, in fact, authorities for the appellant, for the Court passed over the son to the father, and made the father tenant in tail male.

*540 It may be admitted, that, as to the Fifield and Suffolk estates, L, M, and N take estates for life; but that fact does not affect the property in devise No. 1, for that is a substantive devise to be construed by itself. In page 47, the property there devised is referred to No. 1, but No. 1 is nowhere referred to page 47, or to the Suffolk property.

The argument that the testator knew how to create a life estate when he wished it by the use of apt words for that purpose, cannot be retorted on the appellant, for in page 35 the testator does not by express words create an estate tail, he does not show his acquaintance with such words, he merely uses words which happen to have that effect according to legal construction.

THE LORD CHANCELLOR.—My Lords, this case comes before your Lordships upon appeal from the decree of Lord Justice Turner, when Vice-Chancellor; and the result of that decree was to declare that the claimant, Gilbert East, the party designated in the will by the letter L, was only tenant for life of the property derived under the will of the testator, with remainder to his first and other sons in tail male. There had previously been a judgment of the Court of Exchequer, declaring that he was tenant in tail, the question having arisen in that Court upon an information filed by the Attorney-General against the trustees of the will, claiming legacy duty, upon the ground that the present appellant was tenant in tail of the estates. The Court of Exchequer adopted the conclusion that the Attorney-General * was * 541 right, that Gilbert East Clayton was tenant in tail, and consequently that the Crown was entitled to legacy duty to a very large amount.

That was in some sort *res inter alios*. The same question was raised as that which is now before your Lordships; but it was not a direct proceeding between the parties, to have their rights established. A suit was instituted in the Court of Chancery to administer the property of the testator, and in that suit the Vice-Chancellor made the declaration which is now the subject of appeal.

My Lords, having been a party to the judgment in the Court of Exchequer, and having there given what I considered a full and anxious attention to the case, I am in a somewhat difficult position, because in truth the appeal is brought to obtain your Lordships' decision between the conflicting judgments of the two Courts. I have always felt that when a Judge has to say whether a former judgment of his own was right or wrong, he is placed, if he wishes to be candid, in a double difficulty. On the one hand, there is inseparable from the human mind a natural bias or leaning to the belief that you were originally right; and on the other hand, there may be a danger that, from the fear of doing injustice by too rigidly adhering to an opinion formerly expressed, you may not do sufficient justice to that opinion; in other words, that you may do wrong from a fear of appearing to do wrong.

I have endeavoured to divest my mind of all bias either on the one side or the other, and to look at the case simply as if it had now come before me for the first time; and having done so, I am bound to say that I think the Vice-Chancellor was right, and that

the Court of Exchequer, of which I had at that time the honour of being a member, came to an erroneous conclusion. In the

Court of Exchequer the case was necessarily not argued by
* 542 those * who had the real interests of all the parties to bring

before the Court; but I do not allege that as any justification, if justification is wanting, for what I now consider to be the erroneous judgment of that Court. The case was, as far as I can recollect, most fully and elaborately argued, and we probably came to an erroneous conclusion from not adverting to that to which I will now call your Lordships' attention.

The case having been so recently argued here, it would be mere pedantry to go over the will again. Your Lordships are all perfectly familiar with its strange details. The testator, for some inexplicable reason, not choosing to designate his legatees and devisees by name, designates them all by some symbol; and then by a card, which forms part of his will, states what each symbol is meant to indicate. L means the present appellant, and M, N, O, P, and Q, other members of the family. The way in which he makes his will is first of all by directing what is to become of the property in case any one of the parties inheriting that which he calls No. 1, which is the great bulk of his property, namely, personal estate amounting to 200,000*l.*, intended to be invested in the purchase of real estate, shall not comply with the injunctions which he is about to impose. Then at the bottom of the first page he says: "See the line of succession to No. 1, page 7, at page 54, corresponding with the card." Now, looking at page 54, you see this: "Succession of property in this my will, set down at No. 1 and page 7 of this book, marked," and then he gives the marks: "First, to K." K means his wife, afterwards his widow. "Then to ____." We collect from other parts of the will that he there intended to introduce another person, who subsequently died in his lifetime, and who is therefore quite out of the question.

* 543 "Then to L, then to M, then to N, then to O, *then to P, then to Q"; and then he marks in the margin: "The eldest and other sons to inherit before the next letter." Now, conveying these words into each of the limitations, it will run thus: first to K (for reasons I need not state, it is perfectly obvious that K was to take an estate for life only, — there is no question about that), then to L and his eldest and other sons. Taking the words from the margin of the card, and placing them after L, for what is

placed in the margin is stated to be applicable to each of the letters, then L and his eldest and other sons take, and then M and his eldest and other sons ; then the estate goes to N, and so on through the rest of the letters. Suppose the matter stood there, what estate would L take then ? I apprehend there is not the least doubt that L would take an estate in tail male, because of the words "eldest and other sons." Are they words of limitation or of purchase ? They cannot be words of purchase, because then these devisees would only take life estates, and that is obviously not the intention. The different parties are to "inherit," whatever meaning may be attributed to that word. It is quite clear, then, in what sense the testator contemplated the estate was to go on in order of succession, — "Then to L and his eldest and other sons." I think that "sons" there is a word of limitation and not of purchase, that would be to L and his eldest and other sons ; that is, to L and the heirs male of his body, and so on to the others, M, N, O, P, and Q. If it had stopped there, I should have had no doubt that L was tenant in tail male. I think that view is not only not contradicted, but is confirmed, by what is found in the earlier portions of the will, with reference to default in the performance of the conditions in this passage, for it goes on in this way : "And further, if the injunctions and directions in No. 1 be not most fully and rigidly adhered to in * every respect by the * 544 individual first to inherit after K, and therein set down, that then I order and bequeath the property aforesaid set down and particularized in No. 1 to go to M, if not to L, and afterwards to his eldest lawfully begotten son" ; and so on. The meaning of that is obvious. It is to go first to L, and to his eldest lawfully begotten son, &c., and if he does not comply with the conditions, then to M. That has been interpreted to be the meaning, and that is what it must have meant. Therefore the card having given to L an estate, to him and his eldest and other sons, which is interpreted to have been an estate to him as tenant in tail male, how is that explained or opposed by what is found in this page 2 ? He says here it is to go "to M, and afterwards to his eldest lawfully begotten son, &c. on the sole condition of their fully and unequivocally conforming to the conditions therein set down, but not otherwise." I think that is nothing but a similar expression to that which is found on the card, "eldest lawfully begotten son," &c. "Son" must there mean heirs male, or otherwise it would

only go to the party for life, and afterwards to his son for life. Then if he or they shall not conform to the injunctions and directions in No. 1, it is to go over to the next letter, and then to N, and on his decease to his eldest legitimate son ; and in case he or they should not rigidly comply with the conditions, then it is to go over. Then, my Lords, comes this passage, which is relied on by both parties as helping their construction of the case : " But it is my will and order, that in every case a grandson shall inherit before the next named in the entail, or any of his sons." Now I must confess, that that phrase, to my mind, so far from showing that " son," in the former passage, was a word of purchase and not of limitation, aids the construction that " son " in the former

passage, " eldest legitimate son," &c., was to be read as a

* 545 * word of limitation. I conceive the intention of that is

only to make his meaning more clear; he meant to say, though I have said " son," I mean that it is to go to the son, the grandson, and the great-grandson ; that he intended it to go on in the course of male succession before another line is to succeed. It seems to me that this is merely an explanation of what he meant by the word " son." He meant to indicate that though he used the word " son," he considered that word to include in it grandson, and by implication great-grandsons, and so on ; so that in my opinion, the construction to be put upon it by the card, construed by what is to be found in the card only, is not only not opposed, but is confirmed by what is found in pages 2 and 3 of the will.

My Lords, that this is a legitimate construction is established by so many authorities, that it would seem to me to be mere pedantry to cite them or to refer to them. They are perfectly well-known authorities. One of them seems to me to illustrate the argument as well as a hundred. That one was a case before Sir William Grant, of *Wight v. Leigh*,¹ in which very nearly the same expression occurs. There an estate was given to a person, and after his death to his son, and in default of such issue, over. Sir William Grant said : It is quite clear that the estate was to go over on the default of somebody's issue. Was it in default of the son's issue, or was it in default of the father's issue ? He said that it must be in default of the father's issue, because otherwise you must read " son " as a word of purchase. If " son " is a

¹ 15 Ves. 564.

word of limitation, it gives the estate in tail male. If you do not so read it, it becomes merely a word of purchase, and then there would be no words of limitation at all * attaching to * 546 the estate of the son. It appears to me, therefore, my Lords, that if the matter had rested on the card and on those three pages to which I have referred, 1, 2, and 3, still the Court of Exchequer would have come to the right conclusion, that this was an estate in tail male.

It was suggested that the limitation at page 13, in reference to what is called the Fifield property, tends to throw light on the matter, and to show that no estate less than an estate tail was contemplated ; because there the testator, disposing of a very small property which he had, — forty-nine acres of land, at Fifield in the parish of Bray, in the county of Berks, does tie that up in strict settlement ; and it is said to be incredible that he could have meant to tie up in strict settlement that small property of forty-nine acres of land, and not have contemplated the same thing with respect to the great bulk of his property, which was to be purchased with money amounting to above 200,000*l.* My Lords, to that I can only answer, that I do not know what he meant. In a will of this sort, we can only see what he has said ; and it does not appear to me, because he has entailed something strictly, that is, has given a life estate, with remainder to the first and other sons, in a small property, that you can necessarily infer he did not mean to deal differently with the larger property. The argument drawn from the Fifield estate, therefore, seems to me to throw no light on the subject.

Then, my Lords, we come to that matter which, I confess, has altered my view of the case ; that is, the disposition which the testator afterwards makes of what he calls his Suffolk property. In that case there is no doubt that he ties up the property by giving a life interest to the first taker, with remainder to the first and other sons in tail male. He says, at page 47, "First to K," that is, his widow ; "then to M, and afterwards to his eldest legitimate * son ; and then to his other legitimate sons, in order of * 547 primogeniture, provided, but not else, the eldest have no issue male." Nothing could be more clear, therefore, than that, as to this property, M was to take for life, and afterwards his first and other sons in order of primogeniture ; but that his second son was only to take if the eldest had no issue male. That can

scarcely be called an inartificial way of giving the estate ; it is a very proper way of giving it ; he could scarcely have done it in any better way ; " if he have, it will go to him, and so on to the other sons in like manner. After the decease of K, I repeat, I bequeath all the property aforesaid to M and his heirs male, in the manner aforesaid." Now it was said that that shows that what he meant in the former part of the sentence was an estate in tail male, because here he says he gives it to " M and his heirs male." Now I think it is impossible to put that construction on the words. He says there he gives " all the property aforesaid to M and his heirs male, in the manner aforesaid " ; that is to say, I give it to him whom I call M and his heirs male ; which in one sense is correct enough, that is to say, I give it to him for his life, " and afterwards to his first and other sons, and their male issue in succession, in order of primogeniture." Then he says, " as in the case of L, &c., at page 2 " ; from which I can certainly come to no other conclusion than this, that he meant to say, " That is, what I understand I have already done with respect to L at page 2."

Then, my Lords, couple this with what is found stated so very strongly in one of the passages of the will, at page 35, that it was his object strictly to tie up the property : " And I hereby entail them in my family to the utmost extent the laws of England will admit " ; he was saying that with reference to the possibility

* 548 of his having *issue of his own. Still, we may legitimately infer from it his wish to tie up all the property as long as the laws of England would admit. Now, although I say that the expression on the card and the expression at pages 1, 2, and 3 of the will would, I think, if they stood alone, have constituted an estate tail, and not an estate for life, with remainder to first and other sons in tail male, yet they certainly were not necessarily so to be construed. When a testator tells you he understood them to have a different meaning, they are not so impressed with the character of an estate in tail male that that explanation will not aid you to give a construction to what is otherwise obscure. My Lords, I think the limitations he has made in page 47, as to the Suffolk estate, show that to be clearly an estate for life, with remainder to first and other sons in tail male, and are by reference carried back to the estate in No. 1, which is the great estate in question. I am therefore of opinion, that the Vice-Chancellor was right, and that Gilbert East took only an estate for life, and not,

according to the judgment of the Court of Exchequer, an estate in tail male.

One word, my Lords, about a matter that was adverted to by Mr. Rolt in his argument; I mean the gift of two portions of 3000*l.* From that he inferred it must have been the intention of the testator to give an estate of inheritance, and not an estate for life. I am not aware of any authority for holding that a charge, where it is given clearly as a charge on the personality, and not on the estates, has ever been held to constitute an estate tail. Where an estate is given generally by a person who is in possession of the property, as where an estate is given to A. B. without saying what estate he is to have, and afterwards a gross sum of money is charged upon A. B., and he is therefore put under the obligation of paying a gross sum of money, the Courts have said the testator must have * meant to give an estate in fee simple; * 549 but here, where the question on the face of the will is, whether the party took an estate for life or an estate in tail in the contemplation of this testator, neither in the one case nor the other could the devisee raise the 6000*l.* upon the estate, because the testator imposes dire anathemas upon the party who should ever think of selling or disposing of it in any way whatever. It is not necessary, my Lords, to say what is the construction of the will as to those two sums; but I do not think that the grant of them turns an estate which, on the other parts of the will, appears clearly to be an estate for life, into any greater estate. Probably the construction is such, although it is awkwardly worded, as to make those two sums chargeable on the inheritance; but it appears to me clear that they do not convert an estate for life into an estate in tail; and under these circumstances I think it my duty to move your Lordships that the judgment below be affirmed.

LORD BROUGHAM.— My Lords, I take the same view of the subject with my noble and learned friend; but labouring as I now do under very considerable indisposition, I am prevented from stating, except very briefly, the grounds of my opinion. But first I wish to say how entirely I approve of the course taken by my noble and learned friend; a course which Judges ought in all cases to pursue where they find there has been a miscarriage in a judgment pronounced by them. The greatest evils have arisen to the administration of justice, nay, to the law itself, which has thereby been

rendered both obscure and discredited, by the slowness Judges have shown in many instances to admit at once, as they ought to have done, whenever they have felt it, that a decision of theirs has been erroneous. Attempts have often, too often indeed,

* 550 been made to distinguish one case from *another, to discover an altered state of the facts which would justify the Court, in the second case, in not applying the judgment given in the first without however subverting that judgment; and it has also thence resulted, that we know of one or two cases in the law, as to which it is said that the case of *Nokes v. Styles*, in such and such a report, will decide every other case in which the plaintiff's name is Nokes and the defendant's name is Styles, and the subject matter is the same. It is a far better thing, my Lords, to say, as has been said, most fairly, and candidly, and wisely in this case, that the Judges of the Court of Exchequer, though having it argued before them fully, as my noble and learned friend says it was, omitted a material consideration in coming to the conclusion at which they arrived.

My Lords, I entirely agree with my noble and learned friend, that if we confine our attention to the completing part, if I may so call it, of the will to be found in page 54, an estate tail is given, and not an estate for life. The words there taken together are to be taken as words of limitation, not of purchase. I also agree with my noble and learned friend, that you may easily reconcile that conclusion with pages 1, 2, and 3, and to a certain degree with page 7 in the preceding parts of the will. The only point on which I incline to differ with my noble and learned friend is upon his remarks respecting grandsons. The case of a grandson inheriting before a son, in page 3 of the will, and also in page 13, where the Fifield meadows are dealt with, and where there is the same reference to grandsons taking before sons, seems to me quite immaterial; but I am rather inclined to think that those two portions of the will tend more to support the reasoning which sustains the words as words of purchase and not of limitation, and consequently that the estate given is an estate for life, and not an estate in tail.

* 551 * But be that as it may, we now come to that which really does overrule the construction put on the will by the Court of Exchequer, and supports the construction put on it by the Vice-Chancellor, and makes that which else would have been an estate

in tail male to be taken as an estate for life. It is perfectly clear, and requires no authority to show it, that you may refer from one portion of the same devise to another in order to explain what the testator meant in that other portion of it, even when the rules of law, as to construction, are the best established and the most cogent. This has been done, and is done every day. I need only refer to what was said by the Court in *Goodtitle v. Herring*,¹ in which a question arose as to the words most appropriate, as words of limitation, to give an estate tail, namely, "heirs of the body," when the Court, dealing with the question upon the ruling in *Shelley's Case*,² in *Colson v. Colson*,³ and other similar cases, Mr. Justice Le Blanc⁴ said, "There is no rule of law to prevent the words 'heirs male of the body' from being words of purchase if they are clearly so intended to be"; and Lord Kenyon, in that case, says the rule in *Shelley's Case* is oftentimes not a good rule of construction; nevertheless it governs and must govern. He adds, however, it never has been decided that the testator might not otherwise explain what he meant by heirs of his body so as to make the estate taken not an estate tail, but an estate for life, converting those words into words of purchase. The testator, in short, if he chooses, may be his own commentator and conveyancer. He may be so, as I think he has been in this case. The testator may tell us what he meant by these words, and may thus give them a sense different from that which the law, without such an explanation * and interpretation, would impose upon them. * 552 Now the power, or rather the duty, we have of looking to what the testator explains as to the meaning of his words, is not confined to that particular portion of the will in which the words in question occur. You may quite clearly refer from one part of the will to another, from one gift to one person to another gift to a different person, to gather his meaning. Then, my Lords, we go to the gift of the Suffolk property in pages 46, 47, and 48, and it appears to me that there, by distinct reference from that gift to numbers 1, 2, and 3, the testator has told us what he meant, and that we are bound therefore to hold the latter to be an estate for life, and not an estate tail.

My Lords, having once obtained the meaning, and having therefore got at what the gift is meant to be, and having found that

¹ 1 East, 264.

² 2 Atk. 246.

³ 1 Rep. 104 b.

⁴ 1 East, 276.

these are words of purchase, and not of limitation, and that that is the meaning, namely, as giving an estate for life, which we are to impose upon those words, I take it to be clear that we are then to have regard to the words in question when so explained, and that we are to read the devise as if the terms which are so explained were themselves used in the particular devise which we have to construe.

Let us now consider the argument raised by Mr. Rolt with relation to the gift of the 3000*l.* to each of the two nieces. The words of that gift raise the question whether the life estate, otherwise clearly created, is not to be enlarged into a greater estate. Now I looked into the cases immediately after the argument, to see whether I could find any case, for I was not aware of any, in which this mode of construction has ever been applied to enlarge an estate for life into an estate tail, and I did not find any one case of the kind. There are cases enlarging

an estate for life into a fee, under circumstances where a

* 553. charge has * been created which could only be satisfied by such means; but there is an obvious reason for that in the very necessity of the case. The authorities differ even as to the ground of that. Sometimes they seem to think it is because the testator is not to be supposed to have intended to give a *damnosa hereditas*; but other authorities, and better ones, in my humble judgment, put it on a different ground, namely, that he is imposing a burthen on the party taking the life estate, which would be inconsistent with that party taking a lesser estate than an estate in fee simple, and therefore they hold that he meant to give an estate in fee simple; so that where there had been a doubt before, where it was not clearly expressed that he had given an estate for life, they hold that he must be taken to have meant to give an estate in fee by imposing upon the taker of the estate a burthen which would be inconsistent with his taking a less estate. But, my Lords, I take that rule to be always subject to this, that if there has been an express estate for life given before that, that estate so expressly given for life, cannot be afterwards enlarged into a fee by the mere imposition of a charge upon the taker of that estate. Now is there any difference in principle between that case and the present? I apprehend not, because, as I have already said, if by taking the gift in page 54, together with the gift of the Suffolk estate in page 47, you come to the conclusion that there is no doubt, that there is no ambiguity, but that it is perfectly clear that an estate for life

only is given, and not an estate tail ; it is just as much to be taken as an express estate for life, as if it had been given in the most apt and fit terms. Therefore, I apprehend, according to the authority of those cases respecting gifts and burthens imposed on the taker of a life estate, the case of *Denn v. Slater*,¹ * and other * 554 cases of that description, it is perfectly clear that if you have got, either by construction or by plain intendment of terms, an estate for life, then, having that estate for life once given, and there being no ambiguity in the gift, the imposing of a burthen on the estate will not convert it into a larger estate. Here it was argued that it would, in fact, convert it into an estate tail. I take it that there is no authority whatever for that, and no one instance to be found of an express estate for life being converted into an estate tail by merely imposing a burthen on the possession of it. I will not say what might have been the effect in this case if there had been any doubt, after comparing together the different parts of the will ; because that is not the case here. If we are right, that there is no ambiguity, that there is an estate for life given clearly, though not by the description of the order of succession in page 54, or in pages 1 and 2 ; yet most clearly by taking them after reference to the Suffolk estate in page 47, in which the testator has as distinctly told us what he meant in pages 54 and 1, 2, and 3, as if it had there been in so many words expressed ; then there is no warranty for our declaring this life estate, thus clearly given, to be enlarged by the mere imposition of a burthen on the holder of it. Upon the whole, therefore, I have no doubt whatever, that in this case the Vice-Chancellor has come to a right conclusion, and that the judgment of the Court below ought to be affirmed.

LORD ST. LEONARDS.—My Lords, I entirely concur in the opinions which have been already delivered to your Lordships, and although some little doubt might have been entertained with regard to the first parts of this will, if they had been considered alone, yet taking all the parts of it together, I think

* no reasonable doubt can be entered
conclusion. There are certain points
just glance at, in order to remove the
considering the true construction of the
this was an executory trust, and that

according to what we gather of the intention of the testator, expressed in the limitations which are found on the face of this singular will. But I am clearly of opinion that this is not the case of an executory trust, but that we are bound upon this will to give the best construction we can to the limitations, and that we are not at liberty to mould and direct those limitations to carry into effect what we may suppose to be the intentions of the testator, as we might be required to do in the case of what is properly an executory trust. I therefore dismiss that point entirely from consideration.

It is then said, that the matter which my noble and learned friend has last referred to, namely, the portions of 3000*l.* to each of two persons, would create an estate tail. I think the learned counsel hardly ventured to put it so far as that, he rather argued upon those gifts as being unlikely to be connected with an estate for life. I do not enter into the discussion of that question for this simple reason, that the person who first becomes possessed is to pay the 6000*l.*; but that same person is also to be residuary legatee, and therefore the testator has furnished him with very ample funds to meet the charge thus thrown upon him.

The great question raised in this case was as to the gift to an unborn son of a person *in esse*, with remainder to the children of that unborn son as purchasers. This we all know would not be good in law, and the question was, whether it could be executed

*556 by an application of the *cy près* doctrine. Upon that doc-

trine I * was rather startled to hear the learned counsel quote the case of *Hopkins v. Hopkins*.¹ No doubt Mr. Butler, in his edition of Fearne,² says, "It seems to have been assumed that the second son of John Hopkins took an estate tail"; but I can find no trace of any such thing. On the contrary, the decision, so far as it went, was confined to an estate for life, and the former point never was raised in any portion of that case.

The Courts have, in recent times, got over the difficulty of these void limitations to unborn issue of a person who is himself unborn, and is the supposed parent of unborn issue, by the application of the doctrine of *cy près*, that is, if you attempt to give effect to the limitations as they stand, the law will declare them void to a certain extent, but will also carry the intention of the

¹ Cas. Temp. Talb. 44, 1 Atkyns, 581, 2 Jacob & W. 18, note.

² 9th edit. 206, note.

testator into effect to a certain extent. An unborn son will no doubt take for life; but on that limitation you cannot superadd limitations to the issue of that unborn son as purchasers. The law, therefore, steps in benignly, and desiring to effect the general intention, not at the expense of the particular intent (because the particular intent never can be carried into effect), the law does step in on the doctrine of *cy pres*, and says that the parent himself shall take an estate tail, which will comprise in it the issue which the testator intended to provide for. That doctrine is not to be carried any further; it is carried as far in the case of *Vanderplank v. King*¹ as it ever was carried before, if not indeed further; because there, upon a joint gift to several, that gift was severed, and the unborn son and his issue were held to take differently from the rest of the class. Upon that case I do not now give any opinion, it goes much further than any thing which would be necessary in this case. Generally *speaking, as *557 in the case of *Leake v. Robinson*,² before Sir William Grant, when a gift is to a class, and that gift includes persons who are without the line of limitation; that is, if it is put on the ground of perpetuity, you cannot remodel that, because all the persons are intended to take as a class, answering the description, at a particular period, and the same rule must be applied to all the members of the class as to the class itself. I wish to give no opinion beyond that which is necessary to the case now before your Lordships. I therefore leave that case with this observation, that it is perfectly clear in this case that you are at liberty to give an estate in tail male to the unborn sons, represented by the letters N and O; and then the question is whether, if you do so, that breaks in upon your power to give effect to the rest of the limitations, at least those that precede it, according to the intention of the testator. I apprehend that it does not; because here are successive limitations; and if, in order to save this particular limitation, you give to them not a construction repugnant; you do not say that the testator did not give to the unborn son for life, with remainder to his first and other unborn sons as purchasers, you do not say that there is nothing inconsistent in the will, you do not say there was one gift in one way and another gift in another way; but you do say that in that particular case, because the gift cannot have effect given to it by law in the way the

¹ 3 Hare, 1.

² 2 Meriv. 363.

testator intended, you will give to it a different operation, so that it still shall have effect. I wish, therefore, just to press upon your Lordships this distinction, that in coming to that conclusion you do not put on the same words different meanings, because you

hold that the testator in every case meant to make the parent tenant for life, with remainder to * his first and other sons, born or unborn, as purchasers ; but in the particular case of the unborn son you do, in favour of the general intention, give a construction which you do not give to those limitations that require no such aid.

Having cleared away these points, I will shortly call your attention to the view I take of this will, which does not differ from that already stated to your Lordships. I think, as you go through all these limitations, step by step, that at every step you get more clearly at the intention of the testator, till at last all the evidence accumulates so that you cannot entertain any doubt.

In page 1 there is a note referring to the card. I take it for granted that the object of this card, and of this singular mode of drawing his will, was that he was afraid the copy of the will might fall into somebody's hands in his lifetime, and therefore he referred in it to a card, which card I suppose he took care to place where persons could not get at it, and if they did they would not know what the conditions of the will were ; but would require to see both together in order to understand them. In the note in page 1 you will find the reference to page 54, the card containing the line in succession. Now when we look at that card we see that, after enumerating the persons, or the symbols rather, he says what has been already read, "The eldest and other sons to inherit before the next letter." Nothing can be more simple or more clear. The word "inherit" he uses almost throughout, and the word "entail" he also frequently uses ; and it is quite clear that by "inherit" he meant simply a taking under the will, without reference to whether the person was to take as a purchaser or by descent from one of the devisees. He understood very well in

general terms what an entail meant ; he knew it meant to go from son to grandson, and although he did not * express himself accurately, which he thought he could do (and it is his conceit which has brought about this dispute, and unfortunately thrown a doubt upon the intentions he expressed), nevertheless he uses the words in a sense which he no doubt very

well understood, namely, in their general sense. Now, in the limitation of the first estate, on which I do not consider it necessary to give any positive opinion, he gives first to his wife for life, then to L, and then, looking at the card certainly, to L's first and other sons; they are to take before the next letter, there can be no doubt about that, and then the difficulty which I should have had as to what estate was taken under that devise would have been upon the direction (page 3) that the grandson shall inherit in every case before the next taker. As to grandsons, it has been argued very strongly at the bar,—indeed, the case has been exceedingly well argued on both sides,—that if sons can be read as words of purchase, and are to be so read, then grandsons must be equally read as words of purchase. Now I think that is a fallacy, for this reason, that where you read *son* as a word of purchase, there is a gift to the son, but it is not so as to the grandson; but there is a description of the order in which the inheritance shall go. He may be supposed to say: "You L (that is Gilbert East) shall take it for your life, then your first and other sons shall have it according to primogeniture. And a grandson in each case shall inherit before the next son." In that way the sons of the son were to take, although there was no estate in tail male created in the first taker, so that it clearly leads you to ascertain that the intention of this testator was to make these persons tenants for life, with remainder to their first and other sons in tail male.

The way in which the testator manages his will in making the estates go over is by inserting conditions which are to be complied with; and declaring that on non-compliance* with * 560 those conditions the estate is to go over. Page 10 is an instance of this. He has in that place embodied the threats which are elsewhere contained as to non-compliance with the conditions; but instead of putting the limitation first and the conditions last, he has thought fit to reverse the common order, and he puts his conditions first; and then he says the limitations over shall be the same as upon non-compliance with the conditions. The meaning is plain enough, although it is singularly expressed.

When we come to the Fifield property, there can be no doubt that an estate for life was created there, with remainder to the first and other sons. I should entirely agree that it would be very difficult to import that into the first part of the will so as to found

upon it a decision that under No. 1 the party takes for life, with remainder to his first and other sons, if it were not that there are some words in the will itself that rather lead to the adoption of such a course. The testator says he is possessed of those forty-nine acres, and he leaves them thus [his Lordship read page 13]. So that he does here, in the gift of the Fifield estate, expressly refer to the gifts in No. 1, and says that it is his intention in this, as well as in those cases, that a grandson legitimate shall inherit before a younger son. It would be rather difficult, therefore, to come to the conclusion that you are to put one construction on the Fifield estate clause, where there is a reference to another clause, and a different construction on that to which that reference is made. It strongly tends to show what was the intention of the testator.

We pass on, and we find that which is also entitled to attention, namely, a gift of heirlooms ; those heirlooms are to be enjoyed with the estate from one person to another. That is not * 561 conclusive at all ; but it points, as much as * such a matter can, to a regular limitation in strict settlement, and so far it is entitled to some attention.

We then come to that which has been before remarked upon, I mean the gift of the Suffolk estate ; and I must observe, that it appears as if the testator, when he prepared this part of the will, had some precedents before him ; because, although the words are not exactly accurate throughout the gift of his own issue, yet they are sufficiently legal words to create clear estates tail. It seems, therefore, that he knew well enough, when he intended it, how to create such estates. So far, therefore, it seems to me that the evidence of intention becomes clearer as you advance in this will. After a time it becomes impossible to entertain any doubt, the conviction becomes stronger from point to point, till you come to a conclusion which is irresistible as to what was the testator's real intention. Now here it is simply giving the estate generally in words to make the possessor tenant for life, and after him his first and other sons tenants in tail male. The devise of the Suffolk estate is to be read thus (I am not following the words of the will, but I am stating to your Lordships how the devise should be read) : to the widow for life, then to M, which means of course for life, afterwards to his eldest legitimate son and his issue male ; if he had no issue male, to M's other legitimate sons, in order of

primogeniture, in like manner "as in the case of L" (who is the present appellant) "at page 2, and I mean and order," — I call your Lordships' attention to these words, — "I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions." I understand him there, in speaking of the mode and order which "shall prevail throughout the whole entail under precisely the same injunctions," to refer to every entail in his will ; he is dealing with the entail as an entail, although portions * of his property are given to different persons ; yet by his own settlement, which this will was, of the different estates, different estates tail were created, and these words to my mind are perfectly conclusive, — they include the whole of these limitations, particularly this limitation to L, and therefore manifestly in that way there is a clear limitation to L for life, with remainder to his first and other sons in tail male. In these gifts over, in page 48, you will find, and this is very material, that L himself is included in this very limitation. Now it would be impossible to hold, after that reference to the gift of the great bulk of the property as being subjected to the same limitations and injunctions, that he intended to give one estate in the Suffolk property and a different estate in the rest of the property.

My Lords, I have therefore come to the conclusion that this is clearly an estate for life in the appellant, and that the decision of the learned Vice-Chancellor Turner is correct.

I think that in all these cases it is indispensable, in coming to a right conclusion, that your Lordships should go beyond the life estate and ascertain, before you lay it down that it is a clear life estate, what are the estates to follow it. There is nothing so easy as to decide on a particular will that a man takes for life, not following up that decision by a declaration of who is to take after, and in what character, and what the estates are ; whereas if your Lordships were to follow up the declaration that a particular person takes for life, with an enumeration of the persons to take after him, perhaps in some cases in which life estates only have been given, it would be difficult to reconcile the declaration of the tenancy for life with the limitations to follow. I think, however, that there is no such difficulty here, and I have no hesitation in expressing my opinion not only that this is an estate for life in Sir Gilbert * East, but that the remainders after that are * 563

estates in tail male to his first and other sons. The prayer of the bill is for a conveyance, and I should, with the consent of your Lordships, desire to suggest that we should make a declaration, so that there may be an end of the litigation as regards these estates.

Mr. Bates. — Perhaps your Lordships will allow me to apply that it may be referred back to the Court below, to approve of a proper settlement according to the declaration now made by your Lordships ?

LORD ST. LEONARDS. — We should have no objection to that; we should declare that the appellant is tenant for life, with remainder to his first and other sons in tail male, and that he is not entitled to the chattels absolutely, but only for life ; and refer it to the Court below to approve of a settlement, founded upon that declaration.

THE LORD CHANCELLOR. — I think so. I shall therefore move your Lordships that the decree of the Court below be affirmed, with a declaration to the effect mentioned by my noble and learned friend. Proper directions will be given, subject to that declaration, as to the chattels.

LORD ST. LEONARDS. — Certainly ; the House declaring he is entitled to those chattels only for life. The costs should come out of the fund, for the testator himself has created the difficulty.

It was afterwards ordered, “ That the appeal be dismissed, and that the decree complained of be affirmed, except so far as it dismissed the said plaintiff’s bill in the Court below : and it is declared, that the said appellant is tenant for life only of the estates in question, with remainder to his first and other sons successively in tail male : and it is further declared, that the said appellant is not entitled to

the goods and chattels ordered to be delivered to the said appellant by the
*564 order of the said Court of Chancery of the 18th * day of March, 1845,
absolutely, but for life only ; and that after his decease any party shall be at liberty to apply to the said Court of Chancery, as to the said goods and chattels, as he may be advised : and it is further ordered, that the cause be remitted back to the Court of Chancery, with directions to the said Court to make a proper settlement in conformity with these declarations : and it is also further ordered, that the costs of all parties in respect of the said appeal be paid out of the estate of the said testator, Sir Gilbert East, and that the Court of Chancery do give proper directions for payment of such costs accordingly. — Lords’ Journals, 21st July, 1853.

* GREY v. FRIAR.

* 565

1854. June 21; July 4; August 5.

JOHN GREY and others, *Plaintiffs in error.*
THOMAS FRIAR, *Defendant in error.*

Lease. Notice to determine. Condition precedent.

A. became tenant to B. of a colliery and also of some farm land, at distinct rents. The lease contained very numerous covenants as to the payment of the rents, and as to the management of each property. The term created was for forty-two years; but the tenant was to have liberty to put an end to the term, on giving eighteen months' notice before the expiration of the first eight years, or of any subsequent three years. The proviso which gave the tenant this liberty, after describing the giving of the notice, contained these words: "Then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed), this lease, and every clause and thing therein contained, shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, cease, determine, and be utterly void. * * * But nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained."

The Court of Exchequer had held that this proviso did not make the performance of all the covenants a condition precedent to the tenant's power to put an end to the lease. The Court of Exchequer Chamber held that the proviso did make the performance of the covenants a condition precedent.

The Lords were equally divided, and so the judgment of the Exchequer Chamber was affirmed.

THIS was an action of covenant for rent, brought by Thomas Friar, as reversioner, against Grey and others, as surviving lessees of a colliery or coal mine, and a farm, situate in the parish of Northam, in the county of Durham.

The lease upon which the action was brought, dated 30th April, 1838, was granted for a term of forty-two years, commencing 12th May, 1838, determinable, as after mentioned, * at a fixed rent of 280*l.* per annum for the colliery, * 566 on a calculation that there would be annually raised therefrom 134,588 bolls of coal, and 51*l.* per annum for the land, payable half yearly on the 11th of November and the 12th of May in each year. If an increased quantity of coal should be obtained,

an increased rent was to be paid ; if the quantity of coal obtained in any one year should be less than the 134,588 bolls, the rent of 280*l.* was still to be paid, but the deficiency in the coal obtained was to be made up from any surplus quantity obtained in any three succeeding years during the continuance of the lease, but not afterwards. The lease also contained numerous covenants by the lessees, both with respect to the colliery and the farm, and then followed a proviso enumerating these covenants, and providing that if the rents, or any of them, or any part thereof, should be in arrear for forty days, or if payment of money which might be awarded to be due from the tenants for the exercise of any of the powers and liberties granted in the lease should not be duly made, or if any such award should not be obeyed, or if pits not wanted for air or water should not be filled up, or if the carrying on and management of the colliery should be neglected, or if sufficient walls and pillars of coal to support the roof should not be left, or if any thing should be done, or neglected to be done, whereby the colliery might be drowned with water, or otherwise damaged, or if a barrier of twenty yards should not be left against the adjoining collieries, or if the coal under any houses should be disturbed within twenty yards of the site, or if monthly accounts of the quantities of coal wrought should be refused to be presented to the lessor, or if he should be hindered from inspecting the books or gauging the corves, or if the tenant should not

keep the houses, &c. in repair, or should demise or assign

* 567 the colliery without license, or * should enter into partnership with persons except as named in a preceding covenant (namely, those who were of kindred by blood or marriage), or should not manage the lands in the manner specified, or should obstruct the lessor in making trials in working coal, or should become bankrupts, then in any or either of the said cases the covenant for quiet enjoyment hereinafter contained¹ shall cease and be void ; and it shall be lawful for the lessor, his heirs or assigns, to

¹ The covenant for quiet enjoyment was in these terms. The lessor, &c. covenants with the lessees, &c., "that it shall and may be lawful to and for them, well and truly paying the said rents and sums of money at the days and times hereinbefore limited and appointed for payment thereof, and performing all and singular the covenants on their parts and behalves to be kept, observed, and performed (but not otherwise), peaceably and quietly to have, use, and occupy," &c., "during the said term of forty-two years (determinable, nevertheless, as hereinbefore mentioned)."

enter upon and take possession of the demised premises, and the same to have again, repossess and re-enjoy as of his or their former estate; and then also it shall be lawful for the lessor, his heirs or assigns, to enter into and upon all or any part of the said premises, and there to seize and take possession of all or any of the engines, &c. used and employed in carrying on the said colliery, and to sell and dispose of the same in and towards the payment of all or any of the said respective rents which may then be in arrear: Provided also, that if the lessees, their executors, &c. shall be desirous to quit the said premises hereby demised at the end of the first eight years of the said term, or at the end of the first or any subsequent three years after the expiration of the said eight years, and of such their desire shall give to the lessor, his heirs or assigns, notice in writing eighteen calendar months before the expiration of such eighth year, and thereafter before the expiration of any such three years (as the * case may be), * 568 then in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed), this lease and every clause and thing herein contained shall, at the expiration of the first eighth year and thereafter at the expiration of any such third year (whichever in the said notice shall be expressed), cease, determine, and be utterly void to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired; But nevertheless without prejudice to any claim or remedy which any of the parties hereto or their respective representatives may then be entitled to for breach of any of the covenants or agreements hereinbefore contained."

The lease then contained certain covenants on the part of the lessor, and concluded with an arbitration clause, by which, in the event of any question or dispute arising between the parties relative to or concerning the amount of any damage or compensation to be paid under the lease, or any covenant, clause, word, matter, or thing therein contained, either of the said parties could require and obtain a settlement thereof by arbitrators to be chosen as therein mentioned. The declaration assigned two breaches, — one being the nonpayment of rent for the colliery for two years and a half, commencing on the 12th day of May, 1847, and ending on the 11th day of November, 1849; the other being for two years

and a half rent of the farm, beginning and ending at the same times.

The defendants, by their plea, after setting out the lease on oyer, stated that the whole of the rents alleged in the declaration to have become due and payable, had become due and payable after the 12th day of May, 1846, and after the lease had been

determined, and they said that they, being desirous to quit

* 569 the demised premises at the end * of the first eight years of the said term, did, eighteen calendar months before the expiration of the first eight years of the said term, give to the plaintiff notice in writing of such their desire, and thereby gave him notice that they would quit and deliver up possession of the said demised premises on the 12th day of May, 1846, being the end of the first eight years of the said term: And the defendants further said that, at the expiration of those eight years, all arrears of the said rents so reserved and made payable by the said indenture having been paid, and all and singular the covenants and agreements in the said indenture contained on the part of the lessees having been duly observed and performed at the expiration of the said first eighth year of the said term, the said lease, and every clause and thing therein contained, ceased, determined, and were utterly void to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired.

The plaintiff replied, that all and singular the covenants and agreements in the said indenture contained on the part of the lessees had not been duly observed and performed at the expiration of the said first eighth year of the said term, in manner and form, &c.; but that, on the contrary, after the making of the said indenture, and during the term thereby granted, and before the expiration of the first eight years of the said term, the lessees wilfully and negligently omitted to draw and pump out of the said colliery and coal mines divers large quantities of water, which, during, &c., was standing, remaining, and being therein, and which they then might and ought to have drawn and pumped thereout, and that by reason and in consequence of such neglect and omission, the said collieries and coal mines then became and were drowned

and overburdened with water from waters in the said colliery, contrary to the said indenture * and the covenant of the lessees in that behalf, and that at the expiration of the

said first eight years of the said term the said last-mentioned breach of covenant was still subsisting and continuing.

To that replication the defendants put in demurrers, both special and general. The judgment, which proceeded on the general demurrer alone, was, on the 16th July, 1850, given for the defendants.¹

A writ of error was brought upon that judgment, and on the 20th day of May, 1851, that Court reversed the judgment of the Court of Exchequer, and gave judgment for the plaintiff below.²

The present writ of error was then brought. The Judges were summoned, and Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Baron Platt, Mr. Justice Williams, Mr. Justice Erle, Mr. Justice Cresswell, Mr. Justice Talfourd, Mr. Baron Martin, and Mr. Justice Crompton attended.

* *Mr. Hugh Hill* and *Mr. Willes* for the plaintiffs in error. — The rule of construction in a case like the present is, that the parties to the deed must intend to mean what the words they have used in the proviso indicate, unless such a construction of the words should involve inconveniences that would frustrate the object which these parties had in view, and then the other portions of the instrument must be examined, to see what is the sense to be attributed to the particular words. *Kemble v. Farren*,³ *Horner v. Flintoff*.⁴ Here the words expressly say that the lease shall be put an end to by the notice, and the introduction of a condition affecting the right to give the notice, would defeat

¹ 5 Exch. 584.

² 5 Exch. 597. There had been a previous action on the same lease brought in the Court of Queen's Bench (*Friar v. Grey*, 15 Q. B. 891), in which performance of the covenants had been declared to be a condition precedent. The judgment of that Court was reversed in the Exchequer Chamber (*Grey v. Friar*, 15 Q. B. 901), on the form of the pleadings; but it was there said: "Upon the question whether the performance of all the covenants was a condition precedent, it is not necessary for us to give judgment; but we may say, that though the words of the proviso itself cannot be satisfactorily distinguished from those of the proviso in *Porter v. Shephard*, the additional clause, which clearly contemplates that breaches of covenant may have existed, which, after the termination of the lease by the notice, might be sued for by the lessor, inclines us to think that the performance of those covenants could never have been meant to be a condition precedent to the power to terminate the lease in this case."

³ 6 Bing. 141.

⁴ 9 M. & W. 678.

those words. The inconvenience of preventing the tenants from terminating the lease by notice would be very considerable ; for *The Marquis of Bute v. Thompson*¹ shows that a fixed rent, such as exists here, is payable as long as the lease lasts, though after the tenant's entry it should be found that coals cannot be got, or not got in the quantity in respect of which that rent was fixed. The construction, therefore, of this proviso as a condition precedent, would put the parties on an inequality. The clause of the proviso beginning " But nevertheless " does indeed speak of " the covenants hereinbefore contained," but there is not, previous to that clause, any covenant for any act to be done by the lessor, so that the proviso does not operate to preserve the rights of the lessee on the covenants in his favour.

A case directly in point with the present is that of *Dawson v. Dyer*,² where the lessee covenanted to pay the rent, and the * 572 landlord covenanted that he, " paying the * rent " at the appointed times, should quietly enjoy. On disturbance in possession, the lessee was held entitled to bring covenant, though when the cause of action accrued the rent had been in arrear beyond a period at which the landlord was entitled to enter as for a forfeiture, for the payment of rent was held not to be a condition precedent to the performance of the covenant for quiet enjoyment. The case of *Boone v. Eyre*³ is directly to the same effect. There the defendant covenanted that the plaintiff " well and truly performing all and every " the covenants in a deed, the defendant would pay an annuity, and it was held that those words did not create a condition precedent. That case was recognised in the *Duke of St. Albans v. Shore*.⁴ It never could have been intended that it should be requisite that to reserve to themselves the right given by this proviso, the tenants should literally perform every one of these stringent and almost impossible covenants ; some of them, indeed, could not be performed during the existence of the lease ; and then, unless it can be argued that some are conditions precedent while others are conditions subsequent, the construction contended for by the other side cannot be put on this clause in the lease. The subject matter of the contract must be looked at, and

¹ 13 M. & W. 487.

² 1 H. Bl. 273, note.

³ 5 B. & Ad. 584.

⁴ 1 H. Bl. 270 ; see also *Gibbon v. Young*, 8 Taunt. 254, and *Fothergill v. Walton*, 8 Taunt. 576.

then there can be no doubt that if coal should not be found at all, or should not be found in sufficient quantity, the tenant was intended to have the absolute right to put an end to the lease at the end of the first eight, or at the end of any subsequent three years, although every one of the covenants might not then be performed. The strangeness, not to say absurdity, of some of the covenants, such as that forbidding a new partnership, except with persons of kindred by blood or marriage with the lessees, or those relating to the management of the * land, or not hindering * 573 the lessor from shooting over it, gives great force to that argument.

The words here used for the purpose, it is said, of creating a condition precedent, are not apt for that purpose. "Having been duly performed and observed," cannot create such a condition. Sheppard's Touchstone,¹ and *Lister v. Lobley*.² Even in an Act of Parliament, the words "not otherwise" are introduced in order to give the preceding words the force of a condition. There are no such words here. On the other hand, the proviso beginning, "But nevertheless without prejudice to any remedy," &c., plainly refers the lessor to an action as his remedy for a covenant broken, and leaves the right to give notice to put an end to the tenancy unrestricted by that matter.

The case of *Porter v. Shephard*³ will be relied on by the other side, but that case does not govern the present. The words there were "from and after," and that difference of expression clearly distinguishes the two cases from each other. Another ground for the judgment of the Court there was, that if the lease was put an end to, the landlord would be left without remedy for covenants broken; but here the proviso itself obviates that difficulty, and the construction that might otherwise be put upon the words that "this lease, and every thing therein contained, shall be void, as if the term had run out and expired," will not be applicable. It was argued in the Court below that these words must be altogether rejected, unless the other words were allowed to constitute a condition precedent; but in truth the words relied on as such are merely a somewhat clumsy mode of expressing that the tenants were, notwithstanding the notice, to remain subject to an obligation to perform all the * covenants; and then the * 574

¹ 121, 122.

* 6 T. R. 665.

² 7 A. & E. 124.

proviso reserved to the landlord his remedy by action, if that obligation should, at the expiration of the notice, turn out not to have been fulfilled. The principles and authorities which must govern this case are all considered in the note to *Pordage v. Cole*.¹ In *Stavers v. Curling*,² the words were "on the performance of the above-mentioned terms and conditions," and they were held not to constitute a condition precedent, Lord Chief Justice Tindal observing, even as to that strong form of expression, that "Courts of justice are more anxious to discover and be governed by the intention of the parties than to follow the strict and technical form of words used in the instrument." On that principle the cases of *Hays v. Bickerstaffe*³ and *Allen v. Babbington*⁴ had long previously been decided. In the former, the words were "paying the rent and performing the covenants," in the latter, "paying" alone; and in each case it was held that there was no condition precedent, though, as to the former of these cases, it must be admitted that the report says, "Atkyns, Justice, doubted." The principle, however, there acted on by the majority of the Court, has always since been recognised: the intention of the parties must govern: *Warren v. Asters*.⁵ In *Dawson v. Dyer*,⁶ the case of *Simpson v. Titterell*⁷ was referred to for a contrary purpose. Mr. Baron Parke observed, "The reason given there is against you; for it is said by the Court that a proviso always implies a condition, if there be not words subsequent which may change it into a covenant," which establishes that subsequent words may give the meaning, by showing what is the real intention of the parties.

* 575 * The words "all and singular the covenants and agreements on the part of the lessees having been duly observed and performed," if taken as constituting a condition precedent, will render it necessary that every thing, not merely the subject of covenant but of ordinary agreement, shall have been duly performed, before the lessee can give a valid notice to put an end to the term. But some of these matters, such as that relating to arbitration and to the performance of the award, refer to things which it would be impossible to perform till after the expiration of the term; and even as to the payment of rent itself, it cannot be pretended that

¹ 1 Wms. Saund. 820, note 4.

⁴ T. Jones, 205.

² 3 Bing. N. C. 355, 3 Scott, 740.

⁵ 5 B. & Ad. 584, 587.

³ 2 Mod. 34.

⁷ Cro. Eliz. 242.

⁶ Sid. 280.

all the rent must be paid before the notice could be given, for some portion of it would not then have accrued due, the more especially as its amount might be increased by the working of an increased quantity of coal. These considerations show that, if the Courts are to follow the rule of construing instruments by the plain intention of the parties making them, the proviso cannot have been intended by the parties here to be a condition precedent, and must not now receive that construction. It may be contended that the proviso contemplated a case where a forfeiture had already been incurred, but not acted on, as the landlord might wish to keep the lease in force; but that is construing instruments on the supposition of a party acting against his own interests, and contrary to the modes of dealing usual among mankind.

Mr. Bramwell and *Mr. Manisty* for the defendant in error.— This case is one of great importance, for many leases are in this form, and the decision here must affect property to a great extent. Unless the words here are construed as constituting a condition precedent, they become wholly inoperative. It may be admitted that the intention of the * parties must govern * 576 any mere form of words, the proposition for which *Stavers v. Curling*¹ has been cited; and then it is contended that the intention of the parties here was to create a condition precedent. No doubt could be entertained on the subject, except for the last clause in the proviso. Then what is the meaning of that clause? It cannot be that it should have the effect of allowing the tenant to give a compulsory notice to quit, though no rent should have been paid and no covenants performed. Yet such is in truth the meaning that the other side would give it. The proper effect of the clause is to give to the landlord, and not to leave to the tenant, the absolute option of determining the lease by a notice. And such would naturally be the intention of the parties. Such was the construction put by the Court of King's Bench on a similar proviso in a lease, in the case of *Doe d. Bryan v. Bancks*.² There a lease of coals contained a proviso that the lease should be void to all intents and purposes, if the tenant should cease working for two years: he did so cease, but after that time the lessor received rent. In an ejectment brought for a subsequent breach, the

¹ 2 Scott, 740, 3 Bing. N. C. 355.

² 4 B. & Ald. 401.

Court held that the lease was not absolutely void, but was voidable only at the option of the lessor, and that the receipt of rent after the date of the first forfeiture did not create a tenancy from year to year. So here, if the tenant performs all his covenants, and gives the required notice, he may quit; but if he does not perform all his covenants, it is at the option of the lessor whether he may quit or not. If there was no clause giving the tenant the power to determine the lease by notice, that would not make the lease bad. That is in fact the ordinary form of a lease. Then is

* 577 the landlord to be told that, having given such a liberty to his tenant, he *is not to be allowed to enforce the tenant's previous performance of the conditions on which it is given?

The words, expressly reserving to the landlord a right of action which the law would reserve to him without those words, are valueless, and cannot affect the construction of the covenant. The words declaring that, on the expiration of the notice, every thing in the lease shall be void, do not take away the remedy which the law gives the lessor on a breach of covenant which occurred during the continuance of the lease, and therefore the other words were not necessary to protect him in the enjoyment of that remedy. It is not at all incongruous that the lease should be put an end to, and yet that an action for any breach of covenant committed during the continuance of the lease should be preserved.¹ The lessee had expressly agreed that the lessor should have the power to re-enter for every breach but that of nonpayment of taxes. That circumstance is relied on by the other side to show that the performance of every one of these covenants could not be required as a condition precedent to the right to give notice to determine the lease. But the answer is, first, that parties may choose to enter into such an agreement, and next, that here they have done so, having, no doubt, trusted to each other's fair and liberal dealing, and the lessor was evidently intended to have an option which was not extended to the lessee.

Then as to the authorities. *Lister v. Lobley*,² and cases of that kind, are not in point for the construction of voluntary agreements between independent parties. The first case that is applicable to the present is that of *Porter v. Shephard*,³ and that is a conclusive authority. The particular words there used do

¹ See *The Attorney-General v. Cox*, 3 H. L. Cas. 240, 275.

² 7 A. & E. 124.

³ 6 T. R. 665.

not distinguish it from the * present. *Dawson v. Dyer*,¹ * 578 too, though quoted on the other side, may be relied on for the defendant in error, for though the decision there seems to be the other way, the reasons given are in favour of the defendant in error; and the remark of Mr. Justice Parke² on the case of *Simpson v. Titterell*,³ which had been cited in argument, establishes the rule that "a proviso always implies a condition, if there be not words subsequent which may change it into a covenant." The proviso here is the condition, and there are no subsequent words which have the effect of converting it into a mere covenant. The reasoning of that observation applies with full force in the present case.

The second part of the proviso here cannot be allowed to control the former, for that would be to erase the covenant contained in it, which the law will not allow. *Saward v. Anstey*,⁴ *Hesse v. Stevenson*.⁵ The case of *Thornhill v. Hall*⁶ laid down the rule in the strongest terms, that when an interest is given, or an estate conveyed, in one clause of an instrument, in clear and decisive terms, it cannot be taken away or cut down by any subsequent words that are not as clear and decisive as the words of the clause giving the estate or interest.

It is a mistake to suppose that there was no covenant by the landlord previous to the proviso for determining the lease. There was such a covenant, by which he bound himself to repay to the tenants the expense of the grass seeds sown after the harvest next preceding the determination of the term. The argument drawn from the supposed absence of such a covenant therefore fails. The intention here was to create a condition precedent in favour of the lessor, and the words used are apt words for that purpose.

* No mere question of inconvenience can be allowed to effect * 579 the construction of a proviso which does in form constitute a condition precedent; but if the form of expression is not sufficient, and intention is to be the guide, the nature of the property, and the covenants between the parties, amply justify the construction that the lessor was intended to have the option of allowing or refusing, under certain circumstances, the termination of the tenancy.

¹ 5 B. & Ad. 584.

² 5 B. & Ad. 587.

³ Cro. Eliz. 242.

⁴ 2 Bing. 519.

⁵ 3 Bos. & P. 565.

⁶ 2 Clark & F. 22.

Mr. Hill, in reply.—There is nothing here which shows that the lessees meant to bind themselves for forty-two years to what might be a very unprofitable concern, and to give to the landlord the option of refusing to free them from it. *Doe d. Bryan v. Bancks*¹ does not support the argument for which it is cited. That case was determined on its own peculiar circumstances. There had been a breach of a particular covenant, the landlord had received rent, another breach of the same covenant occurred, and it was held that, though the covenant said that the lease should “be void” if that covenant was broken, those words did not operate against the landlord. That decision was correct, for otherwise the tenant, by his own wrongful act, might have put an end to the lease; but that decision does not touch the present case. The difference in the expressions in *Porter v. Shephard*² makes that case also distinguishable from the present. There was not in that case any thing like the proviso “but nevertheless” to be found here, while there the words “from and after” gave a definite and absolute meaning to the other part of the clause. In *Saward v. Anstey*³ the covenant was not restrained by any subsequent words, but here it is so restrained. *Stavers v. Culling*⁴ proceeded upon principles which must govern the present case; and there are no circumstances here which render those principles inapplicable.

THE LORD CHANCELLOR, having stated the circumstances of the case, said that he did not think it necessary to embody these circumstances in the form of a supposed case for the opinion of the Judges, but should give the Judges the record, and as the question raised upon it was purely one of law, should propose simply to ask them, “Whether on this record judgment ought to be given for the plaintiffs in error, or the defendant in error?”

LORD BROUGHAM entirely agreed with this mode of putting the question in the present instance.

The question was agreed to, and was put to the Judges.

MR. BARON PARKE, in the name of the Judges, requested time to answer it.

July 4.

MR. BARON MARTIN.—In answer to the question proposed by

¹ 4 B. & Ald. 401.

² 2 Bing. 519.

³ 6 T. R. 665.

⁴ 3 Scott, 740, 3 Bing. N. C. 355.

your Lordships to the Judges, I have to state that, in my opinion, judgment ought, on this record, to be given for the plaintiffs in error.

The question between the parties is, whether the performance of the covenants contained in the lease was a condition precedent to the determination of the lease by the lessees under the proviso? I am of opinion that it was not.

It is clear that, notwithstanding the determination of the term by the lessees, it was contemplated by the parties that the lessor might have a then existing cause of action against them for breaches of covenant, for the concluding words are for the express purpose of protecting this right; but this appears to me inconsistent with the contention on behalf of * the defendant in error, for, according to it, the precise observance of all the covenants is a condition precedent to the lawful determination of the term at all; and if a single one of these covenants had ever been broken, the power of the lessees to determine it was absolutely gone. It has been said that these concluding words are for the purpose of securing to the lessor the right of action upon the covenants, should it be discovered that they had been broken after he had acted upon the notice to determine given by the lessees. They are quite unnecessary for this purpose, for the right of action would exist without them; but when it is considered that the notice required by the proviso is for so long a period as eighteen months, it does not occur as likely that a want of knowledge as to the performance or non-performance of the covenants at the time of the determination of the lease was contemplated. It seems to me that the more reasonable mode of construing this proviso is, to hold that the lessees are at liberty absolutely to put an end to the term at the expiration of the eighth year, but that nevertheless they shall remain and be liable for any breaches of covenant which they may have committed, and that upon payment of all arrears of rent (the word "arrears" itself indicating a breach of the covenant to pay the rent), and all the covenants being observed and performed or satisfied, then that not merely the term itself, but all the obligations created by the covenants in the lease, shall cease and be at an end.

This construction, *reddendo singula singulis*, gives effect to every word in the sentence, and, as I think, is a fair and reasonable construction of it. But assuming that there is a difficulty in

giving it this construction upon the mere words of the proviso itself, there can be no doubt, I apprehend, that it was the intention

of the parties that the lessees should have the power of

* 582 determining the lease at the end * of the first eight years

of the term, and that this was meant to be a real power, and not a merely delusive one. Now, looking at the covenants contained in the lease on the part of the lessees, if the performance of these covenants be held to be a condition precedent to the power of putting an end to the lease, it is, to my mind, absolutely certain that the power could never be exercised at all. The slightest deviation from any covenant would put an end to the power ; for instance, their having in tillage more than the prescribed quantity of land, the not summer fallowing the precise number of acres specified, the not ploughing this fallow five times, however unfit and improper it might be to do so, in consequence of a wet season ; the not laying upon every acre the precise specified quantity of lime (there being covenants in the lease as to all these particulars), would, upon the construction contended for on behalf of the defendant in error, absolutely extinguish the power of determining the lease. There is also a covenant that after the harvest next preceding the expiration or sooner determination of the term, the lessees should keep uneaten and free from trespass, all the land on which grass seeds had been sown with the crop next preceding. Now, supposing the lessees had, eighteen months before the expiration of the first eight years, given a notice, perfectly valid in every respect, of their desire to put an end to their interest, and had always paid the rent upon the very days when it became due, and had actually performed and fulfilled every covenant in the lease, yet if, upon the day next before the expiration of the eight years, the cattle of a neighbour had come over the fence and trespassed upon the land on which the grass seeds had been sown, then, according to the argument on behalf of the

defendant in error, the power to determine the lease was

* 583 gone, and the lessees would thereby become absolute * ten-

ants for the entire period of forty-two years. I cannot think that this was the real intention of the parties.

The rule laid down by Serjeant Williams, in his note to *Pordage v. Cole*,¹ which I have always understood to be the ruling authority upon the subject, is, that questions of this kind are to be decided

¹ 1 Wms. Saund. 320 b.

according to the intention^{*} and meaning of the parties, and the good sense of the case, and that technical words should give way to such intention. And it certainly seems to me that good sense dictates that a construction should be avoided which practically renders a determination by the lessees of the lease an impossibility; and that it is more reasonable that the power to determine it should be deemed unconditional, whilst at the same time there is secured to the lessor the full and entire protection of the covenants in his favour, until they all are either fully performed or satisfied. The case of *Hays v. Bickerstaffe*¹ seems also to be strongly in favour of the plaintiffs in error. In a subsequent part of the lease here declared on, there is a covenant on the part of the lessees, that it shall be lawful for them, they well and truly paying the rent at the appointed days, and performing all and singular the covenants and agreements on their parts to be kept, observed, and performed (but not otherwise), peaceably and quietly to enjoy the premises demised. I cannot distinguish between the words in this covenant and the words in the proviso; indeed, if any thing, the words in the covenant seem to me more directly to make the payment of rent and the performance of the covenant a condition precedent to the obligation of the covenant attaching; for the words "but not otherwise" occur in it, and not in the proviso. Nevertheless, in *Hays v. Bickerstaffe*, the Court held that the words "paying the rent and performing the covenants," *584 did not render the performance of these acts a condition precedent to the covenant for quiet enjoyment attaching, but that the covenant was absolute; and this case, I believe, has been acted upon ever since its decision. The judgment of the Court of Common Pleas, in *Stavers v. Curling*,² is also, in my opinion, in favour of the plaintiffs in error. The master of a ship had bound himself to the performance of a great many terms and conditions, and the owner covenanted that, on the performance of the terms and conditions, he would pay the plaintiff a certain proportion of the net produce of the profit of the adventure. The Court of Common Pleas was of opinion that the performance of the terms and conditions was not a condition precedent; and Chief Justice Tindal, after referring to *Boone v. Eyre*, as the leading case on the subject, says "that Courts of justice are more anxious to discover and be governed by the intention of the parties, than to follow the strict

¹ 2 Mod. 34.

² 3 Bing. N. C. 355.

and technical form of words used in the instruments." The case of *Porter v. Shephard*¹ was strongly relied upon on behalf of the defendant in error, as being conclusive in his favour. There can be no doubt that it is perfectly competent for parties, if they think fit, to render the strict performance of all the covenants in a lease a condition precedent to a power by the lessee to determine it by a notice; but I own I very much doubt whether the words in the proviso in question, assuming the concluding part as to the preservation of the right of action in respect of the broken covenants not to exist, are sufficient for the purpose. I do not think the argument of Mr. Wood in that case received sufficient attention

from the Court; and I am disposed to think that the same principle which prevents a sum of money being * treated

* 585 as liquidated damages, when it extends to a variety of minute breaches of contract, would also prevent such general words as the present from being deemed to create a condition precedent, when the slightest breach of one of a very great number of covenants (some of very trifling consequence indeed) would extinguish so valuable and important a power as that of the determination of the lease. I should be inclined to say that, under such circumstances, the parties had not used sufficiently apt words, and not sufficiently expressed their intention to this effect.

For these reasons I think that, upon this record, judgment ought to be given for the plaintiffs in error.

MR. JUSTICE CROMPTON, having stated the circumstances of the case, said: Whether particular words do or do not amount to a condition precedent, must be gathered from the real intention of the parties, as appearing upon the whole instrument. If such intention is apparent, the parties must be bound by the bargain which they have chosen to enter into; but in ascertaining the meaning and true construction of the deed, it is by no means unimportant to observe what the effect of the construction, one way or the other, would be. Accordingly, the counsel for the plaintiff in error, in their argument, pointed out the multiplicity and minute nature of the covenants contained in this lease, and argued, from the impossibility of performing all of them to the letter, that the parties were not likely to have intended that the benefit of this clause was to be lost to the lessee by the infraction of any of the numerous and minute covenants.

¹ 6 T. R. 665.

A proviso of this kind, being for the benefit of the lessee, and being one in its nature to be useful only when the lessee desires to put an end to his lease against the will of his lessor, it seems hardly likely that the arrangement * should be such * 586 as to leave it practically in the power of the lessor to say whether the lessee should ever be able to avail himself of it or not. I quite agree with what was said in the Exchequer Chamber, that these reasons would not justify the Court in refusing to put the construction upon the words which they plainly require; but they appear to me to be important in ascertaining what that construction is, and whether the words do not really bear a construction leading to consequences which the parties were not likely to have contemplated. Words capable of being treated as conditions precedent to rights of action have, in many cases, some of which were cited at the bar, been construed as not amounting to conditions precedent, by looking at the provisions of the whole deed as assisting to ascertain the meaning and construction of the particular expressions; and words of this nature cannot be said necessarily to amount to conditions precedent, as they are not construed to do so when they occur in the common case of covenants for quiet enjoyment.

It was said on behalf of the plaintiff below, that he might reasonably have wished to guard himself, and that he had guarded himself, by words of express condition, against being left, on the determination of the term, with the covenants broken, with the property out of repair, and with the rent unpaid; and several arguments founded upon different parts of the deed, and upon the probable intentions of the parties, to be collected from the whole deed, were insisted upon at the Bar for each party; and the question now is, "What is the construction to be put upon the proviso in question, occurring in a deed containing the stipulations relied upon by the respective parties?"

To make out that the proviso in this case was a condition precedent, the case of *Porter v. Shephard*¹ was * relied on. * 587 In that case words nearly similar to those in the commencement of the proviso in the present case were held to amount to a condition precedent. There were, however, in the proviso in that case no words contemplating that the covenants might be broken, and yet the term be determined by the notice; whilst in the present

¹ 6 T. R. 665.

case I find it stated what is to take place in case the covenants have not been performed, although the term has been determined by the notice.

It seems to me impossible to say that the words clearly show that the performance of the covenants is to be a condition precedent to the determination of the term, when there are provisions, though probably unnecessary ones, for recovering damage for prior breaches of covenant in case of the lease being determined by notice.

On reading the whole proviso together, including the clause beginning "But, nevertheless," it will be found that the events of the covenants having been duly performed, and of their not having been duly performed, are both contemplated, and that the clause provides for each of those cases. It seems, then, to have occurred to the minds of the parties, that there may be covenants broken at the time of the expiration of the notice; and that it would not be proper that in such case the lease and all the clauses should be utterly void, as they have stipulated that they should be on the other contingency. What then is to be collected from the words they use, as to their intention in such a case? Is it that the lease is not to be determined, and that the proviso is to be lost to the lessee? It seems to me that such cannot have been their intention, for they say, "But, nevertheless, without prejudice to any claim or remedy which any of the parties may then (that is, at the time of the determination of the lease) be entitled to for

breach of any of the covenants or agreements hereinbefore

*588 * contained" (these being, as was stated in the argument, covenants on the part of the lessees). The effect seems to

me to be, if all the covenants are duly performed, the term is at an end; the lease is waste paper, and the clauses are all void; but if the covenants have been broken, the parties do not say that the term is not to be ended, but they make other provisions, and say that the clauses containing the remedies for such breaches to which they are then entitled, notwithstanding the determination of the term, shall still continue. It is not said that in such case the term shall not cease, but that in such case there shall be a right of action, and that the clauses in question for that purpose shall still be in existence.

The word "nevertheless" appears to me to mean, although the lease is determined; and I can give no other effect to the expres-

sion, "but, nevertheless, without prejudice, &c.," except by supposing that the lease is to be determined, notwithstanding some covenants have been broken. The words "but, nevertheless," &c. seem to me to say, the lease shall terminate as in the former case, but in the case of any of the covenants having been broken, such covenants, and the clauses relating thereto, shall remain in force.

The suggestions which have been made in answer to the argument arising on the effect of the latter part of this proviso, do not appear to me to be satisfactory. I think that in a stipulation apparently framed to meet the case of claims and remedies for all breaches of covenant then existing, it is hardly probable that the parties were considering such cases as those of the lessor having acted on the notice, or assented to the determination of the lease by acceptance of the notice, either in ignorance of the breaches of covenant, or meaning to waive them. I do not think that the stipulation is properly explained as referring to the rights * of the lessee, as it distinctly applies and refers to the * 589 claim and remedies of any of the parties, and as the covenants mentioned in the early part of the proviso, as "the herein-before-mentioned covenants" are almost entirely, if not altogether, covenants on the part of the lessees. Nor do I think that the stipulation has reference only to breaches of some of the covenants, which, it was said, might be committed after the determination of the term, as I think that the words "to any claim or remedy which any of the parties may then be entitled to for breach of any of the covenants hereinbefore contained," distinctly refer to breaches committed before the determination of the lease. The stipulation being general, as to breaches of covenant, and applying to all breaches as to which a claim might be subsisting, I see no reason to suppose that the parties were referring to cases only which appear to me to be far-fetched, and not the ordinary cases likely to occur, or to have suggested themselves to the minds of the parties as being necessary to be provided against, whilst I think it very likely that if the parties intended the term to be determined by the notice, notwithstanding the breach of the covenants, they would have thought it worth while, after saying that if the covenants were performed, the lease and all clauses should be void, to add, that they should not be void as to by-gone breaches of covenant, especially as at one time doubts seem to have been

entertained as to the right to sue after the determination of the lease.

When so many learned persons have taken different views of this case, it would ill become me to express any confident opinion ; but not being satisfied that the parties intended to make the performance of the covenants a condition precedent, when they clearly appear to me to have contemplated that the lease might be determined, though the covenants had been broken, and

* 590 not being satisfied with the * explanation of the stipulation at the end of the proviso suggested on the part of the plaintiffs below, I think that I ought to answer your Lordships' question by saying that in my opinion the plaintiffs in error, the defendants below, were entitled to the judgment as pronounced in their favour by the Court of Exchequer.

MR. JUSTICE TALFOURD.—In reply to your Lordships' question, I humbly submit my opinion that judgment ought to be given for the defendant in error.

The consideration of the question involves a choice of difficulties, arising from an apparent conflict of two clauses placed by the framer of the lease in juxtaposition ; by the first of which it would seem that all the covenants of the lessees must be performed before its avoidance, while the last purports to reserve, notwithstanding its avoidance, remedies to each party for breach of such of the covenants as precede the proviso. It will be convenient, firstly, to consider the import which the first clause would bear if standing alone ; and, secondly, to inquire how far such import is affected by the subsequent words. Now, on the first view of the case, it can scarcely be contended that the performance of the lessees' covenants must not be regarded as a condition precedent to the avoidance of the lease. The words are similar to those contained in the case of *Porter v. Shephard*,¹ except that in that case the precedence of the condition is indicated by the use of the words "from and after" applied to the avoidance, and in this case, by the use of the past tense, "having been," in the corresponding position. If the words have not this meaning, it seems scarcely possible to attach to them any meaning at all.

* 591 * The only suggestion offered is, that they may be intended to qualify the avoidance of the lease, so as to prevent an

¹ 6 T. R. 665.

apprehended destruction of the remedies arising out of it ; that although the lease was to be determined absolutely at the end of the notice, it was only to be void, as the foundation of rights of action, when its covenants were fulfilled. But if so read, there would be no provision whatever for the determination of the term, apart from the perfect avoidance of the lease on the performance of the covenants, unless the first clause be taken from its position, and interpolated between words which are obviously mere cumulative expressions to denote the same thing, and would then be read thus : " Then and in such case, this lease shall, at the expiration of the eighth year, &c., determine and (all arrears of rent being paid, and all and singular the covenants on the part of the lessees having been duly observed and performed) be utterly void to all intents and purposes, in like manner as if the whole term of forty-two years had run out and expired," — a transposition singularly violent. It may be that the introduction of the analogy between the determination by notice and efflux of time is not necessarily fatal to this supposition, as the parties who probably thought that words of entire avoidance of the lease might prevent the continuance of a remedy by action, may possibly have thought such to be the law when leases expire by efflux of time ; but if they so thought, they have expressly provided against this imaginary mischief by the clause which follows, and which is perfectly apt for that purpose. Having reference, therefore, to these words themselves, and to their position by way of introduced parenthesis in the very body of the clause which gives to the notice its desired force, I can see no ground of doubt that they form a condition precedent to the determination of the term by the exercise of the option given to the * lessees. * 592 It has been argued, that the covenant for quiet enjoyment, which is clearly an independent covenant, is expressed in similar terms ; but this is otherwise, for the words applied to that covenant are present, not past, — " paying the rents and performing the covenants " ; which words are expounded by the proviso of re-entry itself, which refers to the covenant for quiet enjoyment, and provides that in case of any of the enumerated breaches, the covenant for quiet enjoyment shall cease and be void. It has also been argued, that the perfect performance of all the covenants on the part of the lessee is so difficult as to border on impossibility, and that therefore it is unreasonable to suppose it to have been

contemplated as a condition precedent to the exercise of an option which it would render worthless. It has been answered, that this objection would apply to the ordinary proviso for re-entry, which, if strictly acted on by the lessor, and practically enforced by juries, would render every lease containing it determinable at the lessor's pleasure ; and this, although the analogy is not perfect, may well illustrate the species of confidence which persons who take leases habitually place in their lessors, that they will not vexatiously use the customary powers they insist on. But the truth probably is, that in the framing of the proviso in question, the parties did not intend to use the words "duly observed and performed" in their technical sense, as importing that no covenant during the eight years or longer period had ever been broken ; in which sense they are certainly unreasonable ; but in a sense in which they import a condition perfectly natural and just, namely, that before the expiration of the notice, the objects of the covenants should be attained, that is, that the works should be put into repair, the water pumped out of the mine, and every thing done which the lessees

* 593 were bound to do in order that they might * deliver up the premises in a proper condition to their landlord. The great length of the period of eighteen months, provided for the currency of the notice, seems intended for such a purpose ; and if this was the intention of the parties, it was more reasonable than the position alleged by the lessees, that they should be at liberty to throw the mine on the hands of the lessor in such a state as the replication suggests, only leaving to the lessor a remedy by action for damages. We come now to the words which, it must be admitted, create a difficulty : "But, nevertheless, without prejudice," &c. These words have no legal operation or effect whatever, as they merely express what the law in their absence would secure to the parties, rights of action on a determined lease. Still, although they avail nothing, they must mean something. To the suggestions made in the judgments of the Exchequer Chamber, that they may be intended to apply to after-discovered breaches, or to an acceptance of the notice by the lessor, notwithstanding covenants broken, or to the preservation of the right of the lessee to sue the lessor, may be added, that there are covenants to be performed by the lessee, and claims which may arise under the claim of arbitration, after the expiration of the term. If I might speculate on the cause of the introduction, I should attribute it to some

doubt arising in the mind of the framer of the lease, whether there might not arise some case in which the rights of the parties to sue might be improvidently abolished; and thereupon he introduced superfluous words, not pointed to any particular covenant, but large enough to cover any, according to a practice of adding provisos in modern legislation. If all these explanations should fail, still I should think that less violence will be done to the language of the lease by regarding the latter words as impertinent and unmeaning, as they are certainly inoperative, than by * striking out the former from the very body of the clause * 594 which gives the lessee that option on which his defence is based.

For these reasons I think the decision of the Court of Exchequer Chamber is right, and that the judgment should accordingly be for the defendant in error.

MR. BARON ALDERSON.—After much consideration and some hesitation, I have come to the conclusion that this case cannot substantially be distinguished from the case of *Porter v. Shephard*,¹ and that the performance of these covenants is, notwithstanding the introduction of the latter words in it, made by the lease a condition precedent to the power of the lessees by notice to determine it.

It is true that some inconveniences will follow from thus reading this proviso. There is a great variety of covenants in the lease, some of them more, some less, important; and to make the due performance of all a condition precedent to the power of determining the lease, is no doubt to give little effect to it on his behalf. But the words requiring all the covenants on his part to have been performed by him are plain and direct, and the opposite construction labours under a similar difficulty of giving no effect to words introduced clearly on the behalf of the lessor.

If I were to conjecture what the parties really meant, I should say that they perhaps meant to confine these words to the covenants for the breach of which the lessor was, by the clauses of the lease immediately preceding the proviso, entitled to re-enter, and not to all the minute and comparatively unimportant covenants, and that the breach of these was intended to be compensated under the words * immediately following, and, as it * 595

¹ 6 T. R. 665.

is said, qualifying the proviso. But however this may be, I do not think these words so far qualify the proviso here as to make the plain construction of the words of it other than a condition precedent to the determination by notice. Those words may have effect in giving to the lessor power, even if he accepts the notice, of still bringing actions for antecedent breaches of covenant,—a difficulty which was put to the Court in *Porter v. Shephard*; and this acceptance may have taken place in ignorance by the lessor of the breaches of covenant, which would be an additional reason for the insertion of those latter words. But I think that the condition precedent, even taking the words of it, may really mean that covenants broken, if the breach shall be compensated for before the expiration of notice, shall be considered as covenants duly performed within this proviso. For as rent in arrear, if paid before the expiration of the notice, clearly is within it, so the performance of the other covenants being found in conjunction with it, may bear the like interpretation.

I answer this question of your Lordships, therefore, that in my opinion this was a condition precedent, and that the replication on this record is a valid replication, and that judgment ought to be given for the defendant in error.

MR. JUSTICE CRESSWELL.—The question proposed by your Lordships in this case depends upon the construction to be put upon a clause introduced by way of proviso in a mining lease. It is unnecessary, in following so many of my learned brethren, to refer to the pleadings, or to the various stages in which this question has been considered in the Courts below.

According to the opinions expressed in the Courts of *596 *Exchequer and Exchequer Chamber, this proviso, if confined to the words already quoted, would have made the performance of the covenants and agreements contained in the lease a condition precedent to the determination of it by notice at the end of the first period of eight years, or any subsequent period of three years; that it could not be distinguished from *Porter v. Shephard*.¹ In that opinion I entirely concur; and it seems to me that when the terms of the covenant for quiet enjoyment are compared with the terms of the clause in question, there can be no doubt that the parties intended to create a con-

¹ 6 T. R. 685.

dition precedent. But it has been argued that the words which follow, "But, nevertheless, without prejudice," &c., qualify the former part of the proviso, and are inconsistent with giving it the effect of a condition precedent, for that assumes that no covenant has been broken, and that therefore no remedy or claim for such breach could exist, and that it being necessary to give, if possible, some meaning to every part of the lease, the proviso must be so construed as to have something upon which the latter part of it can operate, and that therefore the performance of covenants cannot be treated as a condition precedent to the determination of the lease. But if the former part of the proviso is so worded as to leave no doubt on my mind that the parties intended it to operate as a condition precedent, notwithstanding the addition to it, whereof the meaning may be very doubtful and obscure, I should still think myself bound to give effect to that which remains clear. The latter branch of the clause, however, as it seems to me, is capable of receiving a construction consistent with that which I take to be the plain meaning of the former part.

The lessees * are to make compensation, from time to time, * 597 for damage of various kinds which may be done to the lessor by the exercise of the privileges conferred by the lease; and if differences arise respecting them, they are to be referred to arbitration. Now damage may have been done, and the compensation to be made not ascertained at the expiration of the notice, and the latter branch of the clause may have been introduced to keep unimpaired the claim of the lessor. Again, the lessees covenanted to indemnify the lessor against any claim that might be made against him by any of his tenants by reason of any thing done by the lessees. Under that covenant (although not broken at the expiration of the notice) the lessor might have a claim to which the latter branch of the proviso would be applicable. It may, therefore, have an operation consistent with that which it is agreed would be the construction of the former branch, had it stood alone. This gives effect to each part, without altering or putting a forced construction upon either. I am therefore of opinion that we are bound so to construe it, and consequently, that judgment should be pronounced in favour of the defendant in error.

MR. JUSTICE ERLE.—I am of opinion that judgment should be

given for the defendant in error, on the ground that the performance of the covenants in the lease by the lessee was a condition precedent to the power of determining the lease by notice. The form of words expresses this meaning, according to common understanding: "If the lessees shall give eighteen calendar months' notice before the end of the eighth year, then, all covenants on their part having been performed, the lease shall determine, as if it had expired."

The same form of words was decided to have this meaning * in *Porter v. Shephard*; ¹ and the provision is important to protect the landlord against the fraud or malice of the lessee, who, in the case of a mine, may so work as to obtain in a short time large profit and destroy the future capabilities for working, and, by bankruptcy or insolvency, get discharged from the damages awarded for breach of covenant, and by the notice free himself from further liability during the term; and unless this effect is given to these words, they are inoperative. The case for the plaintiff in error rested mainly on the proviso following this clause, viz. "But, nevertheless, without prejudice," &c.; and it was contended that if the lease could not be determined unless all the covenants had been performed, the proviso for remedy for breach of covenant in case of such determination would be inoperative. But a sufficient answer, in my judgment, was given to this objection in the Court below, that these words may apply either, firstly, to breaches which were not known to the lessor when he took possession of the mine; or, secondly, to breaches which he knew of, but elected not to insist on as conditions precedent to a determination of the term; or, thirdly, to breaches of covenant by the lessor himself. They may also have been intended to obviate an opinion which existed at one time, that the clause making the lease void on a given event, made it void as to breaches of covenant preceding that event; and it seems to me that all or some of these effects are to be given to the proviso, in preference to construing it to take away the effect of a condition precedent from the clause to which it is annexed, under which construction, though it operates to annul the condition precedent, the result is, that each * clause neutralizes the other, and the whole instrument is as if neither clause was in it; for upon a proviso for determining a lease by notice, if nothing is

¹ 6 T. R. 665.

said about existing breaches of covenant, the remedy for them is not affected by the determining of the lease.

It is said that there would be inconvenience in restricting the power of determining it to the event of all the covenants having been performed, which would be almost an impossibility. To this one answer is, that if the parties agree so to stipulate, the law must give effect to the stipulation. It may also be answered, that the stipulation does not mean that there should not have been any breach of covenant during the term, but that when the notice expires there should not exist any cause of action in respect of performance of covenants. The stipulation for arrears of rent being paid, refers to a covenant which had been broken; but all cause of action for the breach having been satisfied by subsequent accord, and the covenant for rent would, within the meaning of this clause, be observed and performed, if all arrears of rent were paid before the expiration of the notice. So the covenant for repair, though broken during the term, would be observed if all repairs were at last completed. So in respect of other breaches; if the damage had been settled by arbitration and the amount paid, or if an action had been brought and the judgment satisfied, the legal duty of the covenantor, by reason of his covenant, would have been so far observed and performed, that all liability in respect thereof would be at an end. In this sense, the stipulation would be free from any hardship towards the lessee, as he might obtain the privilege if he did his duty. This construction does not depend upon giving a peculiar effect to the words of this instrument, for it seems to me that the same principle is applicable to all contracts. The legal effect of the promise * in * 600 every contract at common law is alternative, either to do the thing promised or make compensation instead. In some contracts the alternative is expressed when liquidated damages are stipulated for, in others the liability arises by implication of law, either to do or to compensate for not doing, according as may be settled by accord, or arbitration, or judgment. In all contracts the legal duty thereunder has been performed, and so the contract may be said in one sense to be performed, when either the thing contracted for has been done, or compensation instead thereof has been made.

MR. JUSTICE WILLIAMS.—I am of opinion that on this record

judgment ought to be given for the defendants in error. The question is, What did the parties mean by the proviso which gives power to the lessee to determine the lease by notice eighteen months before the end of the eighth year? It is provided, that if the lessee shall give such notice, "then and in such case, all arrears of rent being paid, and all and singular the covenants having been observed and performed," the lease is to determine. It is contended on behalf of the appellant, that this may mean that the lease is to determine by the notice, though the covenants have not been performed. That this construction is contrary to what the parties have said in the lease, can hardly be denied; but it is contended, that if the proviso should be construed according to its very language, it would be extremely inconvenient, and that this inconvenience, having regard also to the final clause of the proviso itself, justifies a departure in construction from the natural and obvious sense of the words employed. The final clause guards against any prejudice being worked, by the determination of the

lease, to any claim or remedy to which any of the parties * 601 may then be entitled for breach * of any of the covenants before mentioned. And this reservation to the lessor of a right to sue on broken covenants, is certainly inconsistent with the absolute proposition that the lease is not to determine if any of the covenants have been broken. And the question is, What effect ought this inconsistency to produce on the construction of the clause which is supposed to contain that proposition? It is said that the due effect of it is to show that the performance of all the covenants could not have been intended as a condition precedent to the right of determining the lease by the notice. In more untechnical language, this is nothing more or less (as it appears to me) than contending that what the parties have said shall be rejected; inasmuch as they have said that the lease is not to be determined unless the covenants have been performed. Such an effect ought not to be given to this final clause, if its introduction can in any way be reconciled with the operation of the earlier part of the proviso. In order to examine whether this is possible, let the proviso be regarded as if it did not contain the final clause. Then (as it has been laid down in each of the four judgments already delivered on this clause) the authority of *Porter v. Shephard*,¹ as well as the natural and obvious sense of the language,

¹ 6 T. R. 665.

would leave no doubt of the parties having agreed that the lease was not determinable by notice unless the lessee had performed the covenants. Now, suppose the lessee, after having broken some of the covenants, had duly given notice to determine the lease, which notice had been accepted by the lessor, either in ignorance of the breaches or choosing to waive them, and at the expiration of the notice possession had been delivered up to him; would it have been competent to the lessee to demand the possession to be restored to him on the ground that he had *not performed the covenants, and that consequently the lease was not determinable by his notice, but was still in force? Surely the answer would have been, that though, according to the terms of the proviso, the notice is to be of no effect if any covenant shall have been broken, yet it is in the option of the lessor whether he will avoid the notice on that ground. But the question might then arise, whether, having declined to insist on the breach of covenant for the avoiding of the notice, he could be allowed to stand on it as a claim for maintaining an action of covenant. And to put this beyond doubt, a clause might well have been introduced into the lease, that its determination by notice should not prejudice the right to any remedy to which the lessor was then entitled for breach of any of the covenants.

It seems to me that in this way the introduction of the final clause in question may properly be reconciled with the existence of the earlier part of the proviso, construed in the sense that the lease is not to determine by the operation of the notice, if any of the covenants have been broken, and the lessor chooses to avoid the notice on that ground.

This construction does not, as it seems to me, further extend the natural meaning of the language than is done in the familiar instance of a proviso in a lease that it shall be utterly void, to all intents and purposes, for nonpayment of rent or other breach of covenant, and with respect to which it has been established by the well-known series of cases commencing with that of *Rede v. Farr*,¹ that the true construction is, that the lease is not to be utterly void, but voidable only at the option of the lessor; for that the lessee shall not be permitted to take advantage of his own wrong. See also *Hyde v. Watts*.²

In this view of the proviso, I think that effect may be

¹ 6 Maule & S. 121.

² 12 M. & W. 254.

*603 *given to the final clause, consistently with allowing the earlier portion to operate in its natural and obvious sense as a condition precedent ; and consequently, that the judgment of the Court of Exchequer Chamber is right.

MR. BARON PLATT.—The solution of the question proposed by your Lordships to her Majesty's Judges in this case depends upon the proper construction of the proviso which has been discussed at the bar. That proviso had been introduced into the lease for the benefit of the lessees, and provided that if they should be desirous to quit the demised premises at the end of the first eight years of the term, and, of such their desire, should give to the lessor, his heirs or assigns, notice in writing, eighteen calendar months before the expiration of such eight years, then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed), the lease, and every clause and thing therein contained, should, at the expiration of the first eight years, cease, determine, and be utterly void to all intents and purposes, in like manner as if the whole of the term of forty-two years had then run out and expired, but nevertheless without prejudice to any claim or remedy which any of the parties to the lease, or their personal representatives, might then be entitled to, for breach of any of the covenants or agreements thereinbefore contained. Upon this proviso, the plaintiffs in error contend that, having given to the lessor, eighteen months before the expiration of the first eight years, notice of their desire to quit the demised premises at the end of that period, they thereby limited their tenancy to the first eight years of the term, and they seek on that ground a reversal of the judgment of the Court of Exchequer
*604 Chamber. On behalf of the defendant *in error, it is contended that the proviso is not absolute, but conditional ; and that, unless at the end of the eight years the rent had been paid, and the covenants on the part of the lessees had been duly observed and performed, the tenancy continued. If, therefore, the words "all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed," as used in the proviso, are to be read as constituting a condition precedent, the defendant in error is entitled to judgment. If they are not to be so read, judg-

ment should be given for the plaintiffs in error. The reservation of the claims and remedies to which any of the parties might, in the event of the determination of the lease by the notice, be entitled, introduced at the close of the proviso, is well calculated to render doubtful the intention of the contracting parties. The former case went off upon a question of pleading; and although the inclination of my mind on the present question was in favour of the present plaintiff in error, yet upon mature consideration of the provisions of the deed, and the arguments adduced on both sides at the bar of your Lordships' house, I cannot surmount the difficulty presented by the learned counsel for the defendant in error, namely, that if the words are deprived of the function of a condition precedent, they do not effect any purpose whatever; they might have been omitted altogether, or instead of them might be substituted, "although the arrears of rent remained unpaid and the covenants unperformed," without making any difference in the operation of the instrument.

I do not think that a Court of law would be justified in holding that words which, taken in connection with the context immediately precedent and consequent, possess so decisive a significance, were introduced without a corresponding design. Sir John Patteson appears to me to *have disposed of the *605 reservation of the claims and remedies in delivering the judgment of the Court of Exchequer Chamber. The parties contemplating, as regards the lessor, the possibility of his resumption of possession, without being aware of a breach of covenant committed during the eight years by the lessees, and as regards the lessees, the possibility of their having, at the expiration of the eight years, a right of action against the lessor may account for its introduction *abundanti cautela*. For these reasons, I think that the words used in the proviso constituted a condition precedent; and I answer the question proposed by your Lordships, that, in my opinion, the defendant in error is entitled to your Lordships' judgment.

MR. JUSTICE WIGHTMAN.—In answer to the question proposed by your Lordships, my opinion is, that upon this record the defendant in error is entitled to judgment. The question has been considered in the Courts of Exchequer, Queen's Bench, and Exchequer Chamber, and all have agreed in this, that except for

the words at the end of the proviso, "but nevertheless without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, might then be entitled to for breach of any of the covenants or agreements hereinbefore contained," the performance of the covenants would have been a condition precedent to the exercise of the power to determine the lease. But it was considered by the Court of Exchequer, and has been urged by the counsel for the plaintiffs in error, that the words in the previous part of the proviso, which of themselves were unambiguous, and would clearly make the performance of the covenants a condition precedent, were so controlled or explained by the words of the latter part of the proviso, that they would not

amount to a condition precedent, or indeed to any condition

* 606 * at all, and that the case of *Porter v. Shephard*,¹ which would otherwise be a direct authority for the defendants in error, was on that account distinguishable.

It is said, on the part of the plaintiffs in error, that there is an inconsistency in making the exercise of the power to determine the lease depend upon a performance of the covenants, if such exercise of the power is to be without prejudice to any claim or remedy by either party for breach of covenant, as it would be idle and useless to except from the operation of an intermediate determination of the lease any claim or remedy for breach of covenant, if the lease could only be determined in case there had been no breach of covenant; and that by the construction contended for by the defendant in error, no effect whatever is given to the words in the latter part of the proviso, which it is said would be merely useless. It appears to me, however, that the construction contended for by the defendant in error is the true construction, and that by its full effect may be given to every part of the proviso. The lessees alone are to have the benefit of the power of determining the lease, and it may well be that the lessor would annex to that power the condition of having performed the covenants to entitle the lessees to the benefit of it. The consequence might be, that the most trifling breach of covenant would destroy the power; but this does not appear to me unreasonable, or contrary to the intention of the parties. If the lessees found the strict performance of the covenants too onerous, they might relieve themselves at the end of eight years from further performance, and the lessor

¹ 6 T. R. 665.

might wish to give the lessees an interest in the strict performance of the covenants by giving them a conditional power to determine the lease only on such performance. The only difficulty arises from * the terms of the clause at the end of the pro- * 607 viso, reserving any claim or remedy the parties may have for breach of covenant. If that clause has the effect contended for by the plaintiffs in error, it would render the words, which are in form words of condition, wholly without object or meaning, though they are perfectly clear and unambiguous, and the condition they apparently introduce is one of great importance to the lessor; whilst, on the other hand, some effect may be given to the clause at the end of the proviso, if the words in the previous part of it were allowed to have the effect of a condition precedent, which is the only effect they can have, unless rejected as mere unmeaning surplusage. The clause at the end of the proviso may well have been introduced from abundant caution, and to prevent, by express provision, any doubt that might arise as to the remedy of the lessees against the lessor for breach of covenants by them, in case the lessees chose to determine the lease, they having performed all the covenants. That clause would also apply in cases suggested in the judgment in the Exchequer Chamber, in which the lessor had acted upon a notice to determine the lease, and had retaken possession, being ignorant at the time of a breach of covenant by the lessees. It may be observed that, in the covenant for quiet enjoyment, which immediately follows the proviso, the terms used are, "it shall and may be lawful for them (the lessees), well and truly performing all and singular the covenants and agreements on their part to be kept (but not otherwise), peaceably and quietly to occupy, possess," &c.; whilst in the proviso in question the terms used are, "all and singular the covenants on the part of the lessees having been duly observed and performed"; the latter terms indicating a condition precedent, which the words used in the covenant for quiet enjoyment, according to the case of *Hays v. Bickerstaffe*,¹ * and some other cases, would not amount to, * 608 unless the addition of the words "and not otherwise" made them do so. Upon the whole, it appears to me, that by holding the words "all and singular the covenants on the part of the lessees having been duly observed and performed" to amount to a condition precedent, effect is given to every part of the proviso,

¹. 2 Mod. 34.

whilst, by the construction contended for by the plaintiffs in error, those words, apparently so important, are reduced to mere surplusage, and no effect or meaning whatever is attributed to them. And I therefore think that, upon this record, judgment ought to be given for the defendant in error.

MR. JUSTICE COLERIDGE.—I am of opinion that, on this record, judgment ought to be given for the defendant in error. It is agreed that the question turns upon the proper construction to be given to the proviso for the determination of the lease. It cannot, I think, be disputed, that if these words are to be understood in their plain and obvious meaning, they express most unambiguously the intention of the parties to be, that the lessee shall not have the benefit of determining a forty-two years' lease at the end of the first eight years, and subsequently at the end of any three years, unless he has first paid all arrears of rent, and duly observed and performed all and singular the covenants and agreements on his part to be observed and performed. The condition, thus expressed, I think it reasonable to understand as requiring that the account between the parties must, both as to rent and covenants, be clear; the rent need not have been always paid on the day; but all

arrears, if any, must have been paid up; the covenants *609 must have been strictly kept, or, if *broken, must have been satisfied for.

So understood, the words import a condition precedent neither impossible nor unreasonable; and where that is clearly the case, the mere difficulty of performance, from the number or nature of the covenants to be performed,—a fact which must have been perfectly within the knowledge of the party contracting,—seems to me a very unsatisfactory reason for holding it to be otherwise. If the number of the covenants or their nature is in this case a sufficient reason, where is the line to be drawn? What number will be sufficient, or what character will be difficult enough, to show that the parties could not have intended a condition precedent? Or, if it should be said that here, at all events, the number or nature passes the line which it may be difficult to define, why did the parties, not intending a condition precedent, use language to which, without regard to these considerations, no other meaning could possibly be given? The supposition is that the lessee, looking at the numerous and difficult engagements he had entered into, could not have intended,

and did not intend, to make his power of determining the lease dependent on the punctual fulfilment of them. But how is this to be reconciled with the use of language so unambiguously expressing that intention? But then it is said,— and upon this alone reliance was placed in the Court of Exchequer,— a qualification is added at the end of the proviso, which shows that the language preceding must be understood in some modified sense. What that modified sense is, has not been very clearly explained. The qualification is this: “Nevertheless without prejudice,” &c. This, it is said, is only to come into operation when the power to determine the lease has been acted on; but by the hypothesis it can only be acted on if all the covenants have been performed; and then it will be unnecessary. Now, assuming it to be unnecessary, it would seem to me a very insufficient * reason * 610 for doing violence to language so plain as that we have been considering; for it is surely not a very uncommon thing to find in leases or other documents provisions introduced, from over-anxiety or caution, which are not strictly necessary. But whether we consider the words in question a condition precedent or not, I apprehend this clause is equally unnecessary. Suppose the lease determinable by notice, though any or all the covenants are broken, and it is so determined, yet it is only determined “in like manner as if the whole of the said term of forty-two years had then run out and expired”; in which case, without this provision, the lessee might still be sued on the lease for any precedent breaches of covenant. But if the saving is unnecessary equally if you read the proviso in a non-natural sense as if you read it in its natural sense, how can its insertion be an argument against reading it in the latter rather than in the former? Looking at the instrument by the light of common sense, it is easy enough to see why the saving was introduced. In framing instruments such as this, neither the principals nor their legal advisers consider merely what it may be strictly necessary to stipulate for. In order to secure beyond a doubt the performance of that which is conceded, they insert clauses to which no objection is made, because the substance having been conceded, if they are unnecessary, they at least do the one party no harm, and if they are necessary, the other party has a clear right to the insertion. To build elaborately ingenious arguments, and still more to draw from their insertion inferences, on which important rights are to be decided,

seems to me, I own, to be very unsatisfactory and unsafe. For this reason I am not very careful to explain the insertion of this saving; but supposing that it were necessary to insert it, if the lease might be determined by the notice, some covenants having

been broken and the breaches remaining unsatisfied, it

*611 seems * to me that even then it would have been reasonable to insert it, although the proviso be construed as a condition precedent, equally in the one case as the other; for parties do not always act on their extreme rights, and they do not always know all the facts which affect their relations with each other. The landlord might suffer the lease to be determined by the notice, although he knew of a covenant broken, or he might acquiesce in the notice in ignorance of a breach. In either case, it would be important for him to have preserved his remedies on the lease for such breaches. The words of the saving, without any alteration, would be proper to preserve those remedies to him.

My answer, however, to your Lordships' question, does not rest on this explanation, but upon the broad principle of construing language which is unambiguous according to its plain meaning, and ascertaining the intention of parties from the language they use so construed; and I think it of the utmost consequence not to be diverted from that principle in any judicial decision, by the apparent inconvenience or hardships which may follow. It is far better that a known and certain and reasonable rule should bear hard on an individual now and then, who may thank his own incaution, or, it may be, his own dishonesty, for what he suffers, than that the whole public should labour under the intolerable grievance of having no certain rule at all by which their contracts are to be construed. And this last (I say it with great respect for my brethren from whom I differ) seems to me the natural consequence of straining the language of this proviso, so as to make it other than a condition precedent.

MR. BARON PARKE.—To the question proposed by your
*612 Lordships, I have to * answer that, in my opinion, judgment ought to be given for the defendants below, the plaintiffs in error.

In construing the clause on which this case depends, we must adopt the rules of construction now, I believe, fully established,—

we must give effect to the words in their ordinary and grammatical sense, and if that leads to any absurdity or repugnance, or inconsistency with the manifest purpose of the parties to the instrument, to be collected from every part of it, the language must be modified so as to avoid such inconvenience, but no further ; and effect must be given to all the words used, if it can be done. Adopting these rules, I think that the words " all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed," do not constitute a condition precedent.

It will at once be seen that the performance of all the covenants could not be a condition, for there are some which do not apply until after the end of the term, which it was therefore impossible to perform before ; and it is perfectly clear that the language of the proviso must be modified by confining the condition of performance to such as it was the duty of the lessees before that time to perform. But it is possible that the lessees might observe and perform every covenant to be performed before the expiration of the notice, and therefore there is not the same indisputable reason to alter the language of the proviso, as where it is absolutely impossible. The extreme difficulty, however, of performing many of the covenants contained in this lease exactly, coupled with the great importance to the tenant to be able to determine a lease of mines, which is of such a speculative character, and attended with so much risk, renders it highly improbable that the parties could have intended that the power to determine the lease should depend upon the performance by the lessee of every covenant, * especially when some of them are of such a description that no degree of care would certainly secure their performance ; such as the covenant to keep the grass lands free from trespass, which is a warranty against trespassers, and the covenant to consume on the premises all the hay, straw, and turnips produced thereon, which, if it should be pressed with extreme strictness, would be broken if every cartload of straw should not be so spent, even though it might have been stolen or destroyed by accident. These are good reasons for supposing that the parties never could have intended to make the exact and due observance of all and every such covenants a condition precedent, either to the right to determine the lease, or to the off-going crop, which is in the same category. If they did so intend, the defendants would

of course be bound, just as a lessee is bound who agrees that his lease should be forfeited for any breach of covenant, however trifling. But it is to be observed, that in such a case the lessee does not merely rely on the forbearance of the lessor, in not insisting on each minute breach, but a forfeiture is, by law, waived by every subsequent act, even of the slightest nature, affirming the lease after knowledge of its being forfeited. In the present case no waiver by the lessor of the breach of covenants actually broken would put the lessee in the same situation as if they had been performed, according to the terms of the lease; for that would be to vary, by parol, the stipulations of an instrument under seal, which cannot be done. The acceptance of an agreed satisfaction by parol would discharge a covenantor from damages for the breach of covenants, or might be evidence of a new contract, on the terms of the deed, as explained in the case of *Heard v. Wadham*,¹ by Lord Kenyon and Mr. Justice Lawrence, but the stipulation of a deed cannot be varied without deed.

* 614 * If, however, there were no expressions in this lease to qualify or explain the meaning of the words "all and singular the covenants and agreements on the part of the lessee having been duly performed," it would be difficult to avoid giving them full effect as a condition precedent, and the case of *Porter v. Shephard*² could not be satisfactorily distinguished from the present. The words there were certainly stronger, "from and after payment of rent and performance of covenants" being clearer words of condition; and the covenants, too, in that case were not so numerous or so difficult to perform as in this lease; but still I think, that unless there had been some qualifying words, the case would have called upon us to decide in conformity with it.

But there are very important words which follow, and which, I think, cannot be reasonably explained, and have effect given to them according to their ordinary meaning, without holding that the words "all and singular the covenants and agreements," &c. do not constitute a condition precedent. These words follow: "nevertheless without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." These words, according to their ordinary construction, clearly show that, after the end of the lease by

¹ 1 East, 630.

² 6 T. R. 665.

the notice, breaches of covenant might still exist, on which the lessee might have to sue, and consequently that the parties never could have intended that the performance of every covenant should be a condition precedent, for if that had been the meaning, the reservation of the right to sue on the broken covenant would be absurd, as the lease could not have determined at all.

A very intelligible and consistent meaning may be given to the whole sentence without doing violence to the words.

* The effect would be this : If eighteen calendar months' * 615 notice in writing should be given, expiring at the end of the eighth year, then, if the arrears of rent are paid, and all the covenants have been observed, the lease, and every clause and thing therein contained, shall, at the expiration of the eighth year, cease and determine, and be utterly void to all intents and purposes ; the lease shall become as waste paper and useless ; but if covenants are broken on either side, the remedy in the other shall still continue, and the lease not cease and be void in respect of the remedy for those breaches, though it shall for other purposes. It is true that the clause provides that " it shall be void in like manner as if the whole of the years of the term had run out and expired," and if that only had been the case, the lease would not be altogether void and like waste paper.

But these words may be construed, not to limit the preceding declaration that the lease shall be utterly void, but to explain that such termination of the lease shall also be on the same footing as the expiration of the term by efflux of time, as to the many covenants depending upon the end or determination of the term contained in the lease. This construction makes all the provisions consistent ; but if this construction is not adopted, the clause must be expunged, — or the language of this clause must be materially altered, in order to make it consistent with the supposition that the words, before so often quoted, constituted a condition precedent.

It is said by Mr. Justice Patteson, in delivering the judgment of the Court of Exchequer Chamber, that the additional clause may be consistently explained in three ways. All of these require the addition or the striking out of words.

First. It is said they may been inserted to enable the lessor to recover for breaches not known at the end of * the * 616 term ; but the clause reserves the right to remedies for any

of the covenants without any such limitation. To confine it to "the undiscovered breaches" would be to add words; so would it be to confine it to remedies by re-entry or distress, for the clause is not to prejudice any claim of remedy; nor if the rent had been all paid, and the covenants all performed, could there be any right to re-enter or distrain.

Secondly. It is said the clause would apply if the lessor had waived the condition precedent by accepting notice and taking possession, though he might be aware of some breaches of covenant; but that would require an addition of words to limit the remedy to such previous breaches of covenant, whereas, as the clause stands, it is given as to all. Nor, for the reason before assigned, could the lessor waive, by accepting and taking possession, the performance of the condition precedent; a deed would be necessary for that purpose; and after such waiver and taking possession, the lease would still continue, if the performance of the covenant was a condition precedent, and the covenant had not been performed. To give complete effect to this construction it would be necessary to add, after the words "all the covenants being duly performed," some such additional words as "unless the lessor shall think fit to waive or excuse such performance."

In the third place, it is said the stipulation may have been introduced to preserve the right of the lessee to sue on the lessor's covenants. To that the answer was not satisfactory, that it was confined to the covenants "thereinbefore contained," and that there was none on the part of the lessor, for it appears that there was one covenant in a prior part of the deed by the lessor. But this explanation cannot be adopted without altering the words of

the clause, and confining it to the covenants of the lessor,
*** 617** whereas the words * are general, reserving the remedies to both parties and their representatives.

Therefore, to adopt the construction put by the Court of Exchequer Chamber on the latter part of the clause, and to make sense of it, would require considerable alteration of the language, and that for the purpose of construing this to be a condition precedent, which would render the valuable right of determining a speculative lease practically inoperative; for though the covenants could by possibility be performed, practically speaking they never could be.

It is true that the construction which I think should be put

upon the clause deprives the lessor of the additional security for the performance of the covenants which he would have in the continuance of a long lease, which the lessee could not get rid of without their performance, but still he would have his remedy against the lessee for all those breaches, if the lessee was solvent, and if he was insolvent, the continuance of the term would not be of any advantage.

Construing this instrument according to the ordinary rules, I confess I think it clear that the meaning of the clause in question was, that the payment of arrears and performance of convenience should not be a condition precedent, and consequently, that judgment should be for the defendants below.

August 5.

THE LORD CHANCELLOR having fully stated the nature of the action, the pleadings, the judgment of the Court of Exchequer, and the judgment of the Court which had reversed it, and which was now itself the subject of this writ of error, proceeded thus :—

My Lords, from that judgment a writ of error has been brought to your Lordships' House, and it being purely a legal question, your Lordships called in the assistance * of the Judges. * 618 Eleven Judges attended, and of those eleven Judges, eight were of opinion that the Court of Exchequer Chamber was right, and three thought that the original judgment of the Court of Exchequer was right. The great majority was therefore in favour of the judgment which had been pronounced by the Exchequer Chamber, and which is now brought before your Lordships' House for your determination.

The question turns upon the single point, whether there being a proviso enabling the tenant to determine the lease, the actual performance of all the covenants is a condition precedent to the right to determine the lease. My Lords, at the time the case was brought before the Court of Exchequer, I had the honour to sit as one of the Judges of that Court, and I of course took an interest in the judgment. The ground on which the Court of Exchequer came to the conclusion that the performance of all the covenants was not a condition precedent, was this. The lease contains an infinity of covenants of the most minute description. Amongst others there is a covenant that the tenants "will at all times, from and after the harvest next preceding the expiration or sooner de-

termination of the said term, drain and keep uneaten, and free from trespass, all the land on which grass seeds shall have been sown." Now that is but a specimen of a great many other covenants which it is almost impossible that a party could certainly perform, it being a covenant absolutely out of the power of the party to insure its performance; because it would be a breach of that covenant if, in the night before the determination of the lease, some person had maliciously turned his cattle upon the land. If that was done, the tenant would not then have kept it free from trespass. And inasmuch as there certainly must have been some

meaning intended to be given to the power of determining

* 619 * the lease by notice, and inasmuch as it was morally and physically impossible, or at least practically impossible that the tenant could literally perform all the covenants, the Court of Exchequer came to the conclusion that this could not have been intended to be a condition precedent, that if the covenants were broken the parties were liable upon them; but that the power of determining the lease could not be made to depend upon the performance of something which it was impossible the tenants should in truth perform. That was the ground upon which the Court of Exchequer came to the conclusion that the performance of all the covenants was not a condition precedent; on the other hand, the Court of Exchequer Chamber, before which it came upon a writ of error, thought that the strict terms of the lease ought to be attended to, that this was a contract made between landlord and tenant, and that the landlord ought not to be bound to let his tenant free unless under circumstances coming literally within the terms upon which he had stipulated that the tenant should be able to withdraw from his tenancy, it being one of the terms of that stipulation that the tenant should not withdraw unless all the arrears of rent had been paid, and all the covenants and agreements had been duly observed and performed. The argument was that there was no absurdity in such a contract, that parties might make their own terms, that there was no ambiguity in the language, consequently that the language must be strictly adhered to, and that, therefore, unless the tenant had literally performed every covenant, he had no power of putting an end to the lease.

The main reliance in the Court of Exchequer Chamber, in point of authority (the point being extremely simple, as I have already stated), was upon a case which had been decided, some

half century ago, before the Court of King's * Bench, when * 620 it was presided over by Lord Kenyon. It is the case of *Porter v. Shephard*,¹ which was a writ of error to that Court from the Court of Common Pleas; and there very much the same sort of proviso was contained in the lease as that which gave rise to this case. It was an action of covenant for nonpayment of rent for three years and a quarter, due at Lady Day, 1795, on an indenture of demise dated in 1791. The defendant in his plea craved oyer of the deed in which there were covenants by the defendants to repair, "to preserve fruit trees," and so on. There was then this proviso, "That in case the plaintiff in error, his executors, &c. should be minded at the end of the first three or five years of the term to quit and yield up the premises, and of such his or their mind should give notice in writing six months before the expiration of the said first three or five years, then and in such case, from and after the expiration of the said first three or five years, and payment of all rent, and arrears of rent, and duties on the tenant's part to be paid, and performance of the covenants contained on the part of the lessee until the expiration of the said first three or five years, the indenture, and every clause therein, should cease and be utterly void." In that case the Court of King's Bench held that the strict performance of all these covenants, however numerous, however onerous, and however difficult, not to say impossible, it might be to perform them all, was a condition precedent to the tenant's right to determine the lease. And the Judges of the Court of Exchequer, I may venture to say, having been a member of the Court at the time, if they had thought that the present case was undistinguishable from the case of *Porter v. Shephard*, would have most unquestionably felt themselves bound by that authority, however * little they might have been satisfied of the accuracy of the * 621 reasoning. But, my Lords, there appeared to the Court of Exchequer to be a very great distinction in this case, arising from this circumstance, that although the language is the same, or very nearly the same, up to the point at which it is stated that all arrears of rent being paid, and all the covenants being performed, the lease shall expire, words are found here which are not to be found in the case of *Porter v. Shephard*, "and all and singular the covenants and agreements on the part of the said lessees having been duly

¹ 6 T. R. 665.

observed and performed, this lease, and every clause and thing herein contained shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year (whichever in the said notice shall be expressed) cease, determine, and be utterly void " ; and then come these important words, " but nevertheless, without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants hereinbefore contained." It appeared to the Court of Exchequer that, even assuming *Porter v. Shephard* to be good law, this case could not be governed by that, and for this reason. It was impossible (so the Court of Exchequer thought) to consider that the actual performance of every covenant, some of them of an extremely petty sort, and some, as I have shown your Lordships, being impossible of literal performance, could have been a condition precedent to the determination of the lease, that is, a *sine qua non*, without which the lease could not be determined ; because, if it were so, what is the meaning of adding that it is to be utterly without prejudice to any claim or remedy to which the parties may be entitled by the breach of any covenants ? It seemed necessarily (so the Judges

of the Court of Exchequer thought) to contemplate the
* 622 case of a determination of * a lease though there might be
breaches of the covenants with respect to which the parties
should be entitled to sue. That view of the case was, however,
not held by the Court of Exchequer Chamber, and it is now for
your Lordships to decide which view you will adopt, whether that
of the Court of Exchequer or that of the Court of Exchequer
Chamber.

My Lords, if this matter were to have been decided by myself, I confess I should have been very much inclined to adhere to the opinion which was formed by the Court of Exchequer. I confess I think, in my own mere private judgment, that that opinion was right ; and I should have continued to think so, but for a very high authority to which I am about to advert, and which leads me to think that I could not safely advise your Lordships to act upon my opinion. Perhaps it may be that, having been myself a party to that judgment, I may feel an undue bias in its favour. I think, however, I know myself well enough to be sure that that does not influence me. I formed that opinion then, and I am strongly inclined still to entertain it. But in a question of pure law of this

sort, though undoubtedly your Lordships are not bound by the opinion given by the learned Judges, yet, when there was so large a majority of them, eight thinking that *Porter v. Shephard* was rightly decided, and that it governs this case, and only three adopting the view which was taken by the Court of Exchequer, I should have been extremely loath to let my own judgment unduly influence your Lordships. And I am bound to say beyond this, that my noble and learned friend, who is not now present, but is absent in consequence of ill-health, — my Lord Brougham, — having heard the whole of this case, has communicated to me his conviction that *Porter v. Shephard* does govern this case, and that the opinion of the majority of the Judges is the correct opinion and the right view of the case. He was not able to attend * in his place to express that opinion, but I promised * 623 to do so for him. The case, therefore, stands thus, — that there was a unanimous judgment in favour of the original plaintiff in the Court of Exchequer Chamber (the defendant in error here), and eight Judges to three now think that that judgment was right. And if my noble and learned friend were here in his place, and I, acting upon my own judgment, were to move your Lordships to reverse the judgment of the Court of Exchequer Chamber, that could not be done, because, supposing no other noble Lord to take any part in the case excepting those who heard it, and I was, as strongly as I could, to move your Lordships to reverse the judgment of the Court of Exchequer Chamber, there would be one noble Lord only for reversing, and the other for affirming. Now it is well known that a judgment cannot be reversed, unless a majority of the noble Lords who have heard the case shall come to the conclusion that it ought to be reversed. If they are equally divided, the judgment stands as it was pronounced in the Court below. Therefore, though I do not disguise from your Lordships that I still entertain a very strong conviction that the original judgment was right, and that the judgment of the Court of Exchequer Chamber was not right (or at least I should have very strongly entertained that conviction, had it not been for the very great preponderance of authority the other way), I shall therefore feel it my duty to move your Lordships that the judgment of the Court below be affirmed.

Judgment of Exchequer Chamber affirmed, with costs.

Lords' Journals, 5th Aug. 1853.

* 624

* EMMENS v. ELDERTON.

1852. February 17, 19. 1853. April 28; August 12.

W. EMMENS, Secretary, &c., *Plaintiff in error.*
 E. M. ELDERTON, *Defendant in error.*

Agreement. Consideration. Promise. Pleading. "Employ and retain."

A count in a declaration in assumpsit set forth an agreement between an attorney and solicitor and a company, that "from January then next, the plaintiff, as the attorney and solicitor of the company, should receive a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business transacted by him for the company as such attorney and solicitor; and should for such salary advise and act for the company on all occasions in all matters connected with the company" (the prosecuting and defending of suits, preparing bonds, and some other matters, for which he was to be allowed the regular charges, being excepted), "and that he should attend the secretary and the board of directors when required." The count then alleged, "That in consideration that the plaintiff had, at the request of the company, promised the company to perform his part of the agreement, the company promised the plaintiff to perform their part, and to retain and employ him as such attorney and solicitor of the said company, on the terms aforesaid." The count then alleged for breach, that "though for a small space of time the company did retain and employ the plaintiff as such attorney and solicitor on the terms aforesaid, and did pay him a small part of the salary, and though he was always ready and willing to advise and act for the company, and to accept the salary on the terms aforesaid, and in all other respects to fulfil the agreement on his part, yet the company disregarding, &c. did not, nor would, continue to retain or employ the plaintiff as such attorney or solicitor on the terms aforesaid, but, on the contrary," in May, "wrongfully dismissed and discharged the plaintiff from such employment and retainer, and then and from thence hitherto have wholly refused to retain or employ him as such attorney and solicitor of the said company, and to pay him the salary as aforesaid, by reason of which last-mentioned premises the plaintiff has wholly lost and been deprived of the salary, and also of divers great gains and profits which he might and otherwise would have derived from such employment in and about the

* 625 prosecuting and * defending of suits and preparing of bonds, &c." After a verdict for the plaintiff, with 200*l.* damages:—

Held, that the count did sufficiently allege a consideration for the promise to retain and employ the plaintiff as attorney and solicitor, and that the consideration was not exhausted by the promise on the part of the company to perform the agreement.

THIS was an action of assumpsit brought in the Court of Common Pleas by Elderton, an attorney, against Emmens, who was sued as representing the Church of England Life and Fire Assurance Trust and Annuity Company.

The declaration was delivered on the 17th day of January, 1846. It contained four counts; the second alone is material for consideration in this writ of error. That count is as follows:—

“ And whereas also afterwards, to wit, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and forty-four, it was agreed, by and between the plaintiff and the said company, that from the first day of January then next, the plaintiff, as the attorney and solicitor of the said company, should receive and accept a salary of one hundred pounds per annum, in lieu of rendering an annual bill of costs for general business transacted by the plaintiff for the said company as such attorney and solicitor, and should and would, for such salary of one hundred pounds per annum, advise and act for the said company on all occasions in all matters connected with the said company (the prosecuting or defending of suits, the preparation of bonds or other securities for advances by the said company, and monies disbursed by the plaintiff being excepted, and the plaintiff being allowed in respect of such matters to make the usual charges of an attorney and solicitor); and that the plaintiff should attend the secretary of the said company, as well as the board of directors * thereof, and the meetings of the proprietors * 626 thereof, when required. And the said agreement being so made, afterwards, to wit, on the said thirtieth day of November, in the year aforesaid, in consideration that the plaintiff had, at the request of the said company, promised the said company to perform and fulfil the same in all things on his part, the said company promised the plaintiff to perform and fulfil the same in all things on their part, and to retain and employ him as such attorney and solicitor of the said company, on the terms aforesaid. And although the said company did, for a certain small space of time thereafter, to wit, for the space of four months, in pursuance and fulfilment of the said agreement and of their promise in that behalf, retain and employ the plaintiff as such attorney and solicitor on the terms aforesaid, and did pay him a small part of the said salary, to wit, fifty pounds, and although the plaintiff was

at all times, from the making of the said agreement hitherto, ready and willing to advise and act for the said company, and accept the said salary on the terms aforesaid, and in all other respects to fulfil the said agreement on his part, of which the said company always had notice, yet the said company, disregarding their said agreement and their promise, did not nor would continue to retain or employ the plaintiff as such attorney or solicitor of the said company on the terms aforesaid, but, on the contrary thereof, afterwards and before the commencement of this suit, to wit, on the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and forty-five, wrongfully and without any reasonable cause, dismissed and discharged the plaintiff from such employment and retainer, and then and from thence hitherto have wholly refused to retain or employ him as such attorney and solicitor of the said company, or to pay him the salary aforesaid, by reason of which last-mentioned premises the

* 627 * plaintiff has wholly lost and been deprived entirely of the said salary of one hundred pounds, and also of divers great gains and profits which he might and otherwise would have derived from such employment, in and about the prosecuting and defending of divers suits respectively brought by and against the said company, and in and about the preparing of divers bonds, contracts, and securities for the said company and otherwise, to wit, to the amount of five thousand pounds, and has been and is in other respects greatly injured and damaged."

The defendant pleaded four pleas, and the cause came on to be tried before Mr. Justice Cresswell, at the sittings after Trinity Term, 1846, when a verdict was found for the plaintiff on the second count of the declaration, with two hundred pounds damages. The verdict on the first count was, upon motion in term, ordered to be entered for the defendant.

A rule was granted to arrest the judgment on the second count, and was made absolute in Trinity Term, 1847.¹ On the judgment then given, the plaintiff brought a writ of error in the Exchequer Chamber, and the case came on for argument in the Exchequer Chamber on the 30th November, 1847, before Barons Parke, Alderson, and Rolfe, and Justices Wightman, Erle, and Baron Platt, and judgment was given by the Court of Exchequer Chamber on the 15th of May, 1848, reversing the judgment of the Court of

¹ 4 C. B. 479.

Common Pleas.¹ The present writ of error was then brought. The Judges were summoned, and Mr. Baron Parke, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Talfourd, Mr. Baron Platt, Mr. Baron Martin, and Mr. Justice Crompton attended.

* *Mr. H. Hill* and *Mr. Willes* for the plaintiff in error. — * 628
The second count is not sufficient in law. It does not set out the contract in words, nor properly describe the agreement, or allege a breach of it. The agreement did not constitute the relation of attorney and client between these parties, but amounted merely to this, that if the company wanted the assistance of the plaintiff as an attorney he might be employed, and the plaintiff undertook to accept such employment if it was offered him. This is not like the case of an ordinary servant, whose services are to begin at all events, and who may be turned away for any breach of good conduct. Even the Court of Exchequer Chamber admitted that the company was not bound to supply the plaintiff with business, but nevertheless that Court held that it was or might be the duty of the company to retain and employ the plaintiff in the sense of keeping up with him the relation of attorney and client, and that the declaration must be taken to have alleged a breach of the promise by the company in May, 1845. That was erroneous. No such duty is shown on the face of the count. But even if such a duty had been shown, no sufficient breach of it is alleged. The count sets forth that the company would not continue to retain and employ the plaintiff, but does not go on to allege that the company had work on which to employ him. There is, therefore, no sufficient allegation of a breach of the agreement, even as that agreement is supposed to be set forth in this count. In *Ripley v. M. Clure*,² the refusal to receive a cargo, made before the time at which the cargo had actually arrived and could be tendered for acceptance, was held not to be a breach of the contract to accept the cargo on its arrival. In like manner here, the announcement to the * plaintiff that he would not * 629 be employed, without any allegation that there was then work upon which he might have been employed, is no breach of the contract. Put the case the other way. Suppose the attorney had written to say that he would not act as the company's attor-

¹ 6 C. B. 160.

² 4 Exch. 345.

ney, but on the next day, and before any occasion for his services arose, wrote to recall his first letter and to declare his willingness to act : there would not have been any breach of the contract. This is in substance an action against the defendant for saying that the plaintiff would not be employed, though at that moment there is not shown to have been any work about which he could be employed. According to the case already cited, that alone does not constitute a breach of the agreement so as to give a good cause of action. In the judgment in the Exchequer Chamber, reliance was placed on the meaning given in Johnson's Dictionary to the word "retain." It is there said that to retain means "to keep in pay," or "to hire," and on that meaning the Court held that the word "implied a promise to retain," and therefore that it created the relation of attorney and client.

[THE LORD CHANCELLOR (LORD TRURO).—Johnson, perhaps, did not know that an attorney might be changed in the course of a cause ; that he might be " retained " for that cause, and yet need not be employed throughout its course.]

The Court of Exchequer Chamber expressed an opinion on the construction of the contract, which assumed that the plaintiff would not be entitled to his salary unless he actually served for the year,¹ and therefore seems to have assumed that he was entitled to damages, because he was told in May that no services

* 630 would be required from him. But * that is clearly incorrect. To disable him from recovering his salary for the year, he must not only be incapable of serving, but the incapacity must arise from himself. In Bacon's Maxims² the rule is stated, *In jure non remota causa sed proxima spectatur*; and in Viner,³ the case is put of a man being in prison for treason, and so he could not give advice in respect of which he was to receive an annuity, and it was said that notwithstanding such imprisonment the annuity must be paid. The doctrine is stated to the same effect in Plowden.⁴ In Viner, where all the ancient authorities are collected, it is shown that being ready to do the work is sufficient to entitle the party to receive the salary. Sheppard's Touchstone⁵ and Co. Litt.⁶ lay down the same rule. There is no doubt that

¹ 6 C. B. 160, 177.

[•] Condition, 148.

² R. 1.

[•] 204 a. 233 a.

³ Condition B. b. 11, I.

⁴ 32, 160, 381. This seems to be the case of *Oliver v. Emsonne, Dyer*, 1 b.

the company was bound to pay the salary for the year, and that the nonpayment of it at the end of the year would constitute a good cause of action. This count is bad, because it adds another cause of action, namely, for damages in respect of a possible loss through not having been actually employed. The agreement did not expressly promise to give business to Elderton, and if, as is the case here, the promise is founded on an executed consideration, no such promise can be implied in law. The company may have no business to give him, and is not bound to create business for him, though the construction put by the Exchequer Chamber on "retain and employ" seems to imply the reverse.

[THE LORD CHANCELLOR.— You object that there may be such a promise as is stated in the declaration, and yet that that is not a good foundation for what is afterwards erected upon it.]

* That is so. Here is an allegation of special damage, *631 which cannot properly be referred to the promise nor to the alleged breach of it. Even if treated as surplusage, it explains the sense of other averments in the same count, and shows that a promise is thus ingrafted on the agreement which the law will not imply from that agreement. As that cannot be done, the count is bad in that respect.

The cases of *Aspdin v. Austin*¹ and *Dunn v. Sayles*² are decisive of the present. In the former there was an engagement to pay the plaintiff so much per week during two years, and so much more during the third year, and there were mutual promises to perform this agreement; but the Court of Queen's Bench held that such stipulations did not raise an implied promise to employ the plaintiff during two or three years, though if the plaintiff was ready to perform the service during those periods, he was entitled to the stipulated wages. In the latter, the Court expressly adopted and acted on the previous decision.

The judgment of the Court below is erroneous, first, because this is only an agreement by the company to pay the sum of 100*l.* for the year's service, or readiness or liability to serve, and by Elderton to advise and act if called upon to do so; secondly, because there being no profit that he could reap from being employed by the company at the end of the year, other than the 100*l.*, there is no obligation on the company to do more than to pay that sum of money, and the company is not bound

¹ 5 Q. B. 671.

² 5 Q. B. 685.

to do, or abstain from doing, any thing else; so that, thirdly, he sustained no damage, as the company committed no breach of the contract, in consequence of the notice being given in May that the company would not employ him in any business.

* 632 * *Mr. Hoggins* and *Mr. Cowling* for the defendant in error.—The second count shows a hiring for a year, at the salary of 100*l.*, and the promise there laid is one which is to be inferred by law from that hiring, and the agreement, as there set forth, establishes clearly the existence of the relation of attorney and client between these parties. It was natural that it should do so. Elderton had previously been the attorney of the company, and the agreement merely altered to a certain extent the mode of his payment, namely, that his attendances were to be paid for by a yearly salary instead of being paid on a bill of costs. In respect of other business he was to make out the usual bill of costs. Under that agreement he was bound to go on for the current year, and the company was bound to employ him for that time, *Fawcett v. Cash*;¹ and a dismissal before that time amounted to a breach of the agreement. In order to perform the business thus undertaken he was bound to decline all other business that was inconsistent with his engagement to the company. The salary alone could be a payment for that. The dismissal here prevented him from being in a condition to earn the salary of 100*l.*, and that dismissal gave him an immediate right of action. *Hartley v. Harman*.²

Leaving the mutual promises out of the question, what is the meaning of this agreement? The terms are, to "retain and employ." They must mean a regular hiring, a keeping in employment. No particular form of words is necessary for that purpose. *Beeston v. Collyer*.³ It is the same with regard to lands; a grant of lands for twenty years, with entry thereon, has been

* 633 held to give a good * title to an action of covenant. *Style v. Hearing*.⁴ In *Fewings v. Tisdal*,⁵ where the hiring was for a month's warning or a month's wages, it was held that a special contract of hiring was constituted, and that the plaintiff

¹ 5 B. & Ad. 904.

⁴ Cro. Jac. 73.

² 11 A. & E. 798.

⁵ 1 Exch. 295.

³ 4 Bing. 309.

having been paid up to the moment of dismissal, could not recover more on a common *indebitatus* count for work and labour. The cases quoted as to grants of annuity are not in point, for here the agreement is entirely executory ; besides which, there can be no grant of annuity by parol, and the consideration for the grant must be truly stated. The case of an annuity *pro consilio impendendo*, though improperly called a grant of annuity, was merely an agreement to pay beforehand for services to be rendered.

All the law, as stated in Viner, is well discussed in a note to *Pordage v. Cole*.¹ Almost all the old cases depend on the nice distinction whether the covenant is a dependent or an independent covenant : thus, if A. covenants with B. to serve him, and B. covenants with A. at a certain time to pay him 10*l.*, these covenants are independent, and an action may be maintained for the money before any service has actually been performed ; but if the covenant is to pay the 10*l.* for the service, then the covenants are dependent, and the service becomes a condition precedent to the payment, and the action for the money cannot be maintained till the service has been performed, or the person engaging to render it has held himself ready and willing, during the stipulated time, to perform it. So here, if the attorney was ready at any time to perform the contract, he must be taken to have performed it. If a man hires job horses for a year, though he may never use them, he must pay for the hire. The doctrine stated in Viner² cannot be sustained to the extent there stated, it goes too * far ; * 634 for it would show that if there was the grant of an annuity, though the annuitant should do that which violated the condition, yet he might recover.

The agreement here imports a promise to employ *Mountford v. Horton*,³ and the declaration does not give the words a meaning which the law will not imply. After verdict they may be read in any way that will support the verdict. In a deed, the party is at liberty to declare the legal effect of the words, or to use the very words themselves ; if he does not, the other party may do so. So that the words of the deed come before the Court, that is all that is required. The same rule applies to an agreement. Here the agreement in substance is set out, and the law will imply the

¹ 1 Wms. Saund. 319, 320 a.

² 2 New R. 62.

³ Condition, B. b. pl. 11.

promise alleged. To retain and employ an attorney does not of course mean to enter into litigation every day for his benefit, any more than to retain and employ a surgeon would mean to give him occupation every day ; but it does mean to give him the work if and whenever it shall arise, and a refusal ever to give him such work, though made before the work arises, is a breach of the agreement. The cases of *Aspdin v. Austin*¹ and *Dunn v. Sayles*² are not in point, for they were decided on the particular words to be found in the agreements and the particular circumstances of the case. In the former of these cases the plaintiff was not in the defendant's service, and that part of the case (the only one that could have been applicable to the present) was given up.

[LORD BROUHAM.—The count here carries double ; it first states an agreement without stating a consideration, and then a general retainer, and then a promise as made in consideration of the agreement.]

The allegation that special damage did accrue to the
* 635 * plaintiff is immaterial. That damage follows as of course

upon the breach of the agreement to retain and employ. The count properly sets forth the consideration and the promise. It states that an agreement was made, without stating that it was made at the request of the defendant, and being so made, that the plaintiff and defendant mutually made a certain promise ; and so far, therefore, shows the agreement to be the consideration for the promise ; it then alleges that the plaintiff performed his promise in fulfilment of the agreement, and then it shows the agreement to be a sufficient consideration for the promise of the defendant, which it alleges not to have been performed.

It is not disputed that where an executed consideration ends in a specific promise, no other can be alleged but what the law implies ; but there are other cases where only part of the consideration is executed, as by the sale and delivery of goods, yet the liability on the subsequent promise cannot be denied. Thus, suppose the sale of a horse, but the price not then agreed on ; if after delivery the price is agreed on, that price must be paid. If this count had stated the agreement as made at the request of the defendant, who thereby became liable to perform the same, and being so liable, had made the promise, it must be admitted that that promise could only have been treated as a promise to perform the agreement,

¹ 5 Q. B. 671.

² 5 Q. B. 685.

*Hopkins v. Logan.*¹ But nothing of that kind is alleged here. This case more resembles that which is supposed in the judgment in *Kaye v. Dutton*, where it is said by Lord Chief Justice Tindal:² "Two objections were made to the declaration: first, that it did not show any consideration for the promise by the defendant; secondly, that the promise was laid in respect of an executed consideration, but was not such * a promise as * 636 would have been implied by law from that consideration; and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. The cases cited by the defendant, *Brown v. Crump*,³ *Granger v. Collins*,⁴ *Hopkins v. Logan*,⁵ *Jackson v. Cobbins*,⁶ and *Roscorla v. Thomas*,⁷ certainly support that proposition to this extent,— that where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and consequently, any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it. But the case may perhaps be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself or conferred a benefit on the defendant, at his request, under circumstances which would not raise any implied promise. In such cases it appears to have been held, in some instances, that the act done at the request of the party charged, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done."

Here the consideration is not wholly, but only in part, executed, and the breach of not paying according to the promise is properly alleged. *Wilkinson v. Oliveira*⁸ is in * point. * 637 There the declaration was, that certain disputes had arisen, and that the plaintiff was possessed of a written paper which showed that a person under whose will the defendant claimed

¹ 5 M. & W. 241.

² 5 M. & W. 241, 7 Dow. 360.

³ 7 Man. & G. 815.

⁴ 8 M. & W. 790, 1 Dow. N. S. 96.

⁵ 1 Marsh. 567, 6 Taunt. 300.

⁶ 3 Q. B. 234, 2 Gale & D. 508.

⁷ 6 M. & W. 458.

⁸ 1 Bing. N. C. 490.

benefit was a Portuguese, and it was important for the defendant to prove that fact, and that the plaintiff had given that letter to the defendant, and that the defendant had promised to pay the plaintiff the sum of 100*l.* The breach alleged was, that the defendant did not pay the sum according to his promise, and the Court held the breach to be well laid. In Comyn's Digest¹ it is said : "An assumpsit lies, though the consideration be executed in part, as in consideration that he had done a thing at my request." In many of these cases there is no promise which the law would necessarily imply from the agreement. *Bainbridge v. Firmstone.*²

[THE LORD CHANCELLOR.—That was a promise made at the time, as the consideration for the plaintiff allowing the defendant to have the boilers.]

Here there is an actual engagement to retain and employ the plaintiff for a year ; but if not read as so set out in substance, then it must be taken that the words are set out exactly, and that the sum was agreed upon, and mutual promises made, and that the breach is consistent with those promises ; and lastly, this is an independent promise, however it may be expressed ; and this promise itself goes beyond what would be implied in law from the agreement, and has been properly declared on as an independent promise, the breach of which, as here alleged, gave a good legal right of action.

Mr. Willes, in reply. — It may be admitted that it has
*638 been suggested by Lord *Chief Justice Tindal, in *Kaye v.*

Dutton, and there is authority for the proposition, that where an act has been done by one man, at the request of another, and no promise would be implied by law from the doing of that act, the person thereby benefited may afterwards promise, and such promise will be a valid cause of action ; but that does not apply to the present case, for here the promise is alleged to have been made after the agreement, but not after any thing actually done thereon, and the promise exceeds what the law would imply from that agreement. It may also be admitted that at the end of the year the plaintiff is entitled to the 100*l.*, and that the company did nothing to defeat that title. But in order to sustain the verdict, it must be contended that the plaintiff is entitled to be in

¹ Com. Dig. Action on the Case Assumpsit, B. 12.

² 8 A. & E. 743.

the service of the company during the whole year, and that the dismissal from that service during the progress of that year is an injury, in respect of which an action may be maintained and damages consequent thereon be recovered. There is here no relation of attorney and client, and no service the dismissal from which constituted a cause of action. The supposed relation is between an attorney, who may never be called on to do any thing, and a company, which may never have any thing for him to do. *Fawcett v. Cash*¹ is not in point, for in that case there was an express stipulation to retain and employ. Here the dismissal was inoperative to prevent the right to the salary at the end of the year; but the agreement gave the plaintiff no other right, and the count, being for something beyond it, is bad; and the judgment of the Court below cannot be sustained.

THE LORD CHANCELLOR.—The question in this case is in some measure one of pleading; but beyond that it involves a point of law of general *importance. The question I *639 propose to put to the Judges is this: “Would a plaintiff in the Courts of law be entitled, after verdict, to a judgment upon a count in the form of the second count set out in this record?”

The Judges requested time to consider the question.

Ordered accordingly.

1853. April 28.

MR. JUSTICE CROMPTON, having stated the pleadings, said: The question in this case is whether the second count of the declaration is good after verdict. The Court of Common Pleas arrested the judgment upon this count after verdict, on the ground that the promise to retain and employ was not to be implied from the agreement; and that the consideration, being an executed one, would not support such promise.

It must, since the decisions referred to in the argument on this point, be considered as settled law that a count of this nature is bad, if the promise is more extensive than the promise which is implied by law as arising from the past consideration. According to this rule, the count will be bad if the promise to retain and employ the plaintiff below, as such attorney, on the terms afore-

§¹ 5 B. & Ad. 904.

said, at all enlarges the general promise to perform the agreement. If the agreement itself contains this same promise to retain and employ as such attorney on the terms aforesaid, then these words, being surplusage, will not prejudice the count, and must be taken as merely pointing the promise to the breach afterwards assigned for ceasing to retain and employ. If, on the other hand, the words in question at all enlarge the previous agreement, by binding the company to retain the plaintiff in any manner in which the agreement did not bind them, as by binding the company to find him any particular work, or to keep him in work, or to em-

ploy him in any of the business which he was not to do for
* 640 the 100*l.* per annum, * or to continue him in the employment for any time for which they were not bound by the agreement, the count will be bad, for want of a consideration to support this additional promise.

On reading the agreement, I concur entirely with the judgment of the Exchequer Chamber, as to the company being bound to continue the relation of employers and employed, at least for a year. The argument of the counsel for the defendant in error satisfied me that the engagement under the contract, in the words of both parties, for a gross sum to be paid at the end of a year, in lieu of an annual bill of costs, cannot have been intended to continue for less than a year. The contract is for the sum of 100*l.* per annum, and not for payment at that rate; and I cannot think that the parties intended merely to substitute one mode or rate of payment for another, leaving it optional to the employers to put an end to the engagement at their pleasure. The plaintiff may have been induced to forego the usual charges of an attorney, from considering that he was to be paid for the whole year's work; and that, taking the rough and the smooth together, the 100*l.* would satisfy him; and the defendants probably preferred paying the certain sum for a certain time to being subject to the uncertainty of the amount of the charges. It would be quite inconsistent with these views that there should be a power of terminating the engagement, and paying the plaintiff for the services, either according to the scale of attorneys' charges, or *pro rata* in proportion to the work done, or the time during which he continued to serve.

Supposing the case one of employment and service, the words of the contract appear to me as strong in favour of the engagement

lasting during the year, as the words in *Fawcett v. Cash*,¹ where an engagement to pay at the * rate of 12*l.* 10*s.* per month for the first year, and to advance 10*l.* per annum until the salary was 180*l.*, was held to bind the employer to employ the plaintiff for one whole year. The agreement seems to me to be clearly a contract of hiring and service. It is specified what the party is to do, and what he is not to do, for the 100*l.*, which he is to receive at the end of the year. Surely this is an agreement, on the one hand, to hire for the particular service, at a given salary, for a year at least, and, on the other, to serve in the specified matters on those terms. Then are the words "retain and employ" to be construed as meaning any thing more than is to be found in the agreement itself? I am of opinion that they must be construed (especially after verdict) as correctly describing the effect of the preceding agreement, and as flowing out of, and really arising from and implied by it. And I think that if the declaration, after stating the plaintiff's part of the agreement as the consideration, had, without mutual promises, merely stated a promise by the company to retain and employ the plaintiff as such attorney, on the terms aforesaid, it would have been proved by production of the agreement. The words "on the terms aforesaid" seem to me to limit the retainer and employment to what has preceded; and the effect of the allegation seems to be, that the company engages to retain and employ the plaintiff according to the agreement, and no further.

The principal question has been raised as to the word "employ," and it has been argued that this word must be taken to mean that actual employment was to be found from time to time for the plaintiff. I think, however, that the words "retain and employ," as used in the present case, are a mere amplification of the preceding contract of hiring and service. These words are used in the precedents continually as meaning a hiring, engaging, and keeping a * person in a service, and do not necessarily * 642 imply that the master is bound to supply the servant with any particular work whilst the relation subsists. In *Fawcett v. Cash*,² when Mr. Justice Taunton said that the defendant was bound to retain and employ the plaintiff for the whole year, he surely did not mean more than that the relation of master and servant was to subsist during the year; and he could not be sup-

¹ 5 B. & Ad. 904.

² 5 B. & Ad. 904.

posed to mean that the master was to be bound to supply the warehouseman with work during the year. The words "retain and employ" may, I think, be used, either popularly or legally, in the sense in which the Exchequer Chamber has construed them; and, if at all capable of such a construction, they are to be taken after verdict in the sense which will support the declaration. It has been suggested that the words "retain and employ," as used in the second count, would be merely inoperative, if used in the sense in which they were construed in the Exchequer Chamber, and that to give them any operation they ought to be construed as meaning that the party was to be actually employed. Since the new rules prevented the old method of declaring in one count on the agreement as set out with mutual promises, and in another on the legal effect of the agreement, it has not been unusual for pleaders to add to the promise to perform the agreement a promise to do some particular matter which they suppose to be the legal effect of, or to be contained in it, and on which they subsequently assign a breach. This is a very dangerous mode of pleading, and is generally useless, as, if the promise be really contained in the agreement, it is unnecessary, and if not so contained, it may make the

count bad. But it has been often used in practice, probably

* 643 for the purpose of applying the breach * more pointedly to the promise; and I do not think that the adoption of such a mode of pleading can be fairly treated, as showing that the pleader used the words in question in a sense which would make the promise larger than the agreement, and so make the count bad. It was said also that the special damage laid for the loss of profit arising from the loss of the employment, showed the sense in which the word "employment" had been used in the earlier part of the count. The real breach, however, is well and properly assigned for a dismissal from the situation, and is more applicable to such a dismissal, or putting an end to the relation between the parties, than to any refusal to find employment for the plaintiff. And it is the promise and the real breach to which we are to look in order to see whether the action is maintainable, the special damage being no essential part of the count, not being traversable, and, if bad, not vitiating the other part of the count. It is usual to include in the special damage every possible claim, however unlikely to be supported, on the ground that, if bad, it can do no harm, and that it may possibly prevent the plaintiff from being excluded at the trial

from giving evidence of particular damage, of which the defendant may not have had sufficient notice from the real breach by reason of its generality. It does not appear safe to refer to matter which is no essential part of the count, and which may be stated in the loosest manner without affecting the count, for the purpose of giving to the promise and breach, if otherwise good, and especially after verdict, a sense which would make them bad.

It was further contended in the argument, that there is a distinction between the cases, where there is the relation of attorney and client, and that of ordinary master and servant. And it was said that, in the case of domestic servants, there are collateral advantages for the loss of * which an action for * 644 damages would lie ; and that in such case there is really a contract to keep in employment, in addition to what is said to be the only contract in cases like the present, to pay at the end of the year. I think, however, that this distinction is not tenable ; and that, wherever there is a contract for hiring or employment on the one part, and service for wages or salary on the other, for a specified time, there is an engagement on the part of the employer to keep the employed in the relation in question during that time, and not merely to pay him the wages for the services at the end, and that, in none of these cases, does the obligation to keep retained and employed necessarily import an obligation on the part of the master to supply work. The warehouseman in *Fawcett v. Cash*, and the clerks and servants in the ordinary cases, could make no complaint if the master employed other persons, and there was no work for them, any more than the plaintiff in the present case could have complained if the defendants had given work to other attorneys, or had none to give to the plaintiff. It is said, however, that the only remedy in such cases is to wait till the end of the year, and sue for the wages or salary as a sum certain, averring that the plaintiff was ready all the time to perform, but that the defendant dispensed therewith. *Fewings v. Tisdal*,¹ which was cited as showing the contrary, is distinguishable, as in that case the declaration was in *indebitatus assumpsit* in the common form for work actually performed, and that decision is not necessarily inconsistent with a right to bring an action of debt for the sum certain, averring a continual readiness to the end, and a dispensation. Such a doctrine, however, would be

¹ 1 Exch. 295.

liable to many of the inconveniences pointed out by the
 * 645 judgment in the Exchequer Chamber ; * and it would be much to be lamented if a servant, or agent, or clerk, who was dismissed, should be able to say, "I could easily get another situation, as good or better, but I will not do so, and instead of claiming the real damage I have sustained by the inconvenience and temporary loss of situation, I will bring an action for every instalment of salary till the contemplated period has elapsed." It is not, however, necessary in the present case for your Lordships to decide whether such an action could be maintained. There may be some contracts for payments, as by way of annuities for life or years, where, by reason of express stipulation, the payment may become due from time to time, until some default has happened on the part of the annuitant. There may be others where the salary depends on the performance of the labour, and where the only remedy in the case of a wrongful dismissal would be by action on the contract for damages.

The question now is, whether there cannot be a breach of such a contract of employment and service as the present by a dismissal ; for if so, both parties have agreed on these pleadings that such a breach has taken place. It seems to me quite too late to question the principle upon which so many actions have proceeded in modern times ; and which is, that after a dismissal, the servant or party employed may recover such damages as a jury may think the loss of the situation has occasioned. If he has obtained, or is likely to obtain another situation, the damages ought to be less, or nominal, according to the real loss ; and in such case the servant need not remain idle, in readiness to give services which cannot be wanted. I quite agree with what was said by my brother Erle in this House,

in the case of *Beckham v. Drake*,¹ that where a promise for
 * 646 continuing employment * is broken by the master, it is the duty of the servant to use diligence to find another employment. If such an action was not maintainable, and the only remedy was by action of debt for the salary, the servant could enter into no inconsistent employment ; or, if he did, could recover nothing. Thus, suppose that the servant chooses to enter into a situation at a smaller salary, he could maintain no action at all, because he could not aver that he continued ready to serve till the salary became due. Suppose a clerk or agent to be engaged for

¹ 2 H. L. Cas. 606.

some years at a yearly salary and to be wrongfully dismissed, surely he is not bound to remain idle, and to sue his employers every year for his salary ; but he may engage himself elsewhere, and at once bring an action for the dismissal ; and he does not, by engaging himself elsewhere, lose a right to this remedy, as he would to the other supposed remedy. If there is a contract to keep in the employment, it seems necessarily to follow that a dismissal from such employment is a breach of contract.

The result of the modern authorities, as to the remedies of a servant wrongfully discharged, is well discussed in the passage in Smith's Leading Cases.¹ He is said to have the election of treating the contract as continuing, and suing for damages for the breach by the discharge ; or, of treating it as, and acquiescing in its being, rescinded by the wrongful act of the master, and bringing an action on the *quantum meruit* for the work actually performed ; and it is added, that he may wait till the termination of the period for which he was hired, and may then, perhaps, sue in *indebitatus assumpsit* for the whole wages, relying on the doctrine of constructive service. It is clear, since the decision of *Fewings v. *Tisdal*,² that this last remedy cannot be maintained in the shape of *indebitatus assumpsit* ; for the simple reason, that the allegation of his being indebted for work done is untrue. But that decision may be supported on the form of action ; and the question is still left undecided, how far a special action of debt averring a contract to pay, a continuing readiness on the part of the servant during all the period to serve, and a dispensation from the service on the part of the master, might not be maintained. A great part of the argument of the counsel for the plaintiff in error at your Lordships' bar proceeded on this point. But even supposing that they were correct, that such an action would have been maintainable on the particular contract, it by no means follows that the servant should be bound so to wait, and that he may not elect the first of the remedies, and sue for the breach in not continuing him in the employment. Whatever doubt remains as to the law on the supposed third remedy, I am not aware that the first has been ever doubted, in cases where it appears that there was to be the continuing relation of employer and servant, which is the real question in this case.

¹ *Lampleigh v. Brathwait*, Hobart, 105 ; 1 Smith Leading Cases, 67.

² 1 Exch. 295. *

The cases of *Aspdin v. Austin*¹ and *Dunn v. Sayles*² must, I think, be considered as decided upon the construction of the particular covenants and the peculiar circumstances appearing in those cases. If they are to be taken as deciding that there is no obligation on the part of the employer to continue the relation between the parties in cases like the present, or that, where there is an agreement to employ and serve for a specified time at a specified salary, an action is not maintainable against the employer immediately for a wrongful termination of the relation, but that the party discharged, instead of suing for damages immediately,^{*} must wait, and remain idle till the end of the specified period, and then sue for the salary as a sum certain; I should think that they ought not to be supported in a Court of Error.

In the present case I think that the contract was a contract for an employment and service to continue at least for a year; and that the promise to retain and employ, laid in the second count of the declaration, does not enlarge the promise arising from the employment; and that the wrongful dismissal, which is the real breach, gave a right of action for the damages really sustained by reason of the dismissal.

I answer your Lordships' question, therefore, by saying that, in my opinion, a plaintiff would, in the Courts of law, be entitled, after verdict, to judgment upon a count in the form of the second count set out in this record.

MR. BARON MARTIN. — In answer to your Lordships' question, I have to state that, in my opinion, a plaintiff in a Court of law would be entitled, after verdict, to judgment upon a count in the form of the second count set out in the record.

In considering the question, I think the second averment in the count must be entirely disregarded. The promise there alleged is not supported by any consideration, and is a nullity. The first point is, What is the true meaning of the agreement stated in the first averment? And in my opinion it signifies that the directors expressed their then present intention, that the plaintiff below should be their attorney for the year from the 1st of January, 1845, and that they agreed to pay him 100*l.* for transacting their general business during that period.

¹ 5 Q. B. 671.

² 5 Q. B. 685.

There was no obligation upon them to give him any such business; but at the expiration of the year he would be * entitled to receive the 100*l.*, provided he had been ready * 649 and willing during that period to transact for them such general business as they required him to do. I think, after verdict, the agreement may be taken to have been made on the 30th of November, 1844; and the action having been commenced on the 8th of January, 1846, a year's salary was earned, and the plaintiff is entitled to recover it, if it appears upon the face of the count that he was ready and willing to perform his part of the contract, and that the company has not paid him his salary. In my judgment both these circumstances are distinctly averred; and I therefore think that the second count is good.

MR. JUSTICE TALFOURD. — Two principal considerations are involved in the question proposed by your Lordships in this case: What is the true import of the agreement stated, as made between the parties, and which forms the sole consideration for the promise alleged? — and, What is the effect of the breach or breaches complained of as violating such promise? The first consideration must, it is conceded, be confined to the matter alleged to be agreed, inasmuch as it is clear that the words added to the statement of mutual promises, — “and to retain and employ him as such attorney and solicitor of said company in the terms aforesaid,” cannot avail the plaintiff below, by extending the agreement to something not antecedently involved in it; as, if used in such sense, there is no consideration to support them, and, if so understood, they vitiate the pleading. Is there, then, to be found in the preceding words of agreement any contract which is afterwards shown by apt averment to be broken? The question which has been mainly argued is, whether any contract is alleged as made by the company to continue, for a year, with the plaintiff below, the relation of solicitor and client, * which * 650 was broken by his dismissal and discharge, and the refusal of the company to continue to retain or employ him; and it appears to me that the count neither alleges nor implies such contract.

The agreement stated as that of the parties seems to assume that the plaintiff below was, at the time it was made, attorney and solicitor to the company, and appears to have had for its object the fixing

and determining the extent and mode of remuneration during such period as the relation should continue, but does not profess to determine the period for which such relation shall endure, or the circumstances or the mode in which it may be determined by either of the contracting parties. It may contemplate such relation as probably subsisting for a year or for many years ; it may possibly be collateral to some other contract fixing the duration of such relationship ; but it seems to me that, in itself, it does not by any necessary implication bind the company to continue to retain and employ the plaintiff as solicitor in any sense for any term, or to abstain during any period from his dismissal. The cases of *Aspdin v. Austin*¹ and that of *Dunn v. Sayles*² seem to establish that a contract, whether under seal or not. under seal, to pay wages or salary during a stipulated time, does not imply an obligation to retain or employ the party entitled to receive it during the corresponding period ; that, if able and willing to render service, he is entitled to demand his wages ; but that he cannot insist on being enabled to earn them. I cannot distinguish the principle on which these cases are decided from that which should govern the present ; for the degree of inconvenience which might result from implying a contract to retain or employ in any case can scarcely

be regarded as affecting the principle ; and if it could have

* 651 * such operation, I cannot think the Courts are bound to take judicial notice of the necessity that every joint stock company must exist for at least a year, or that it must require the aid of a standing solicitor during that time. Indeed, in the case of *Aspdin v. Austin*, there was a circumstance which has no corresponding incident in the present case, by which a contract to give actual employment might be rendered probable ; namely, that at the end of the term contemplated in that case, a partnership was to be formed between the parties in the business which was the subject of the previous services and salary. I therefore think that the count discloses no contract to retain the plaintiff below as solicitor to the company for a year ; and consequently, that if there was no breach sufficiently alleged, except his dismissal from the employment of the company, the count would disclose no good cause of action. But I think the count does allege an agreement to pay the plaintiff below one year's salary of 100*l.*, and that it does assign a sufficient breach of that contract in the nonpay-

¹ 5 Q. B. 671.

² 5 Q. B. 685.

ment of that salary. After alleging the agreement for salary to take effect from the 1st day of January next, that is, the 1st of January, 1845, it alleges that although the company did retain the plaintiff for a time, and paid him a small part of the salary, and although he was at all times ready and willing to advise and act for the company, and to accept the said salary on the terms aforesaid, and in all respects to perform the agreement, whereof the company had notice, yet the company, before the commencement of the suit, to wit, on 25th of May, 1845, wrongfully dismissed the plaintiff from such employment and retainer, and "then and from thence hitherto wholly refused to retain him, or to pay him the salary aforesaid ; by means whereof plaintiff has wholly lost and been deprived of the salary of 100*l.*, and also of gains and profits in respect of the matters which the salary was not *to include." Now, considering that, according to the *652 record, a full year had elapsed from the day whence the salary was to commence, and that the day of its payment had arrived, I think there is alleged a continuous refusal to pay, and a default in payment of that sum which had so accrued due ; that such is the meaning any ordinary reader would attribute to the allegations as to salary ; and that, after verdict, this meaning ought to be applied to them. It may still be objected to the count, that the words which follow the mutual promises, "and to retain and employ him as such attorney and solicitor of said company on the terms aforesaid," expand the promise beyond the consideration, and so render the count vicious, though without them there might be a good contract alleged, and a sufficient breach of it averred. This objection would prevail if the expressions were such as must necessarily be construed so to extend the sense ; as if, for example, they had been, "and to retain and occupy plaintiff for the term of one year " ; but I think their reasonable construction is that of mere tautology, and that they implied no more than that the company, while retaining and employing the plaintiff, will do so on the terms aforesaid ; that is, that they will pay him at the rate of 100*l.* a year for certain business, and will allow him, when employed in other matters, to make for them regular solicitor's charges. In this sense the words are superfluous, and will not vitiate.

For these reasons, considering that the count discloses a contract on sufficient consideration to pay a salary of 100*l.* for a year

which had expired, for services which the plaintiff was willing to render during the period, and a sufficient breach of such contract, I answer your Lordships' question, whether the count is sufficient, after verdict, in the affirmative.

* 653 * MR. JUSTICE WIGHTMAN.—I was of opinion at the time the judgment of the Court of Exchequer Chamber was given (to which judgment I was a party), that the second count of the declaration was maintainable after verdict, and I am still of the same opinion. The Court of Common Pleas considered the second count bad, on the ground that the consideration, as stated, would not warrant the promise alleged to have been made by the defendants in the Court below. The Court of Exchequer Chamber reversed the judgment of the Court of Common Pleas, being of opinion that the agreement stated in the second count warranted the promise and the breach. It is stated in that count [his Lordship read it].

It was contended, on behalf of the company, that the agreement thus stated in the second count, did not contain any contract by them to retain or employ the plaintiff, either express or by implication. If it did, the addition of the special promise to retain and employ, to the general promise to perform the agreement, would be but surplusage, and unobjectionable after verdict. The question is, What is the effect of the agreement stated in the second count, as it is there stated? It is not necessary that a covenant or agreement should be couched in express terms. There may be a covenant or agreement contained by necessary implication, in terms which do not directly amount either to a covenant or agreement. An instance occurs in the case of *Pordage v. Cole*.¹ It was there held, that where it was agreed between two parties that one should give the other a sum of money for his land, there was a covenant or agreement by the party who was to receive the money, to convey the land. That case, in principle, is

* 654 strongly applicable to * the present. In this case it was agreed by the plaintiff and the company that he, as the attorney and solicitor of the company, should receive and accept a salary of 100*l.* per annum. The salary being 100*l.* per annum was intended to last for one year at least; and as the plaintiff agreed that he, as the attorney and solicitor of the company,

¹ 1 Wms. Saund. 319.

would accept a salary of 100*l.* a year, there was an implied agreement on the part of the company, that he should be the company's attorney and solicitor for a year at least, and that the company would pay him the salary which he had agreed to accept. It is not necessary for the fulfilment of the agreement, that he should be exclusively the attorney and solicitor of the company, nor that the company should find him work to do. The terms "retain and employ" would be satisfied by the company keeping the plaintiff in the service or employ, in case there was work for him to do, though it may be that the company gave him none. The defendants agree with the plaintiff that he, as solicitor of the company, should receive and accept a salary of 100*l.* per annum, instead of sending in an annual bill of costs, and would act for the company, for that salary, in all matters connected with the company, with certain exceptions. What are the obligations upon the parties to such an agreement? I should say, that for a year, at least, the attorney would be bound to transact the general business of the company for that salary only, and the defendants would be bound, for the same period at least, to keep him in their retainer and employment as an attorney and solicitor, though they might have no work for him to do. The word "employ" does not necessarily mean employed in actual work; but, as observed in the judgment in the Court below, may be fulfilled by keeping him in the service. It is in effect a contract for employ in the sense of service and pay; and the breach is, that the defendants have neither employed * him nor paid him, although he was always * 655 ready to act for the company, according to the terms of the agreement.

It does not appear to me to be necessary to advert to the cases that were cited upon the argument, as the question in this case turns upon the meaning and effect to be given to the words "retain and employ," as used in the count in question. The construction contended for by the plaintiff, and adopted by the Court of Exchequer Chamber, appears to me to be the correct one; and I therefore answer your Lordships' question in the affirmative.

MR. JUSTICE ERLE.—I am of opinion that your Lordships' question must be answered in the affirmative. The point is, whether the defendants, by the agreement stated in the second count, contracted to retain and employ the plaintiff as attorney and solicitor

on the terms of that agreement. And if "retain" means to keep in pay or to hire, and "employ" means to engage in a service, as explained in the judgment of the Exchequer Chamber in this case, it is clear that the defendants did both retain and employ the plaintiff, when they agreed to pay to him 100*l.* annual salary, in consideration of certain services as attorney and solicitor, to be performed by the plaintiff, if required. Although these words may be capable of another meaning, and, construed in this sense, are superfluous in this declaration, still, after verdict, if among the meanings which the words are capable of, there is one that will support the declaration, it is a rule of construction that that meaning shall be adopted. The agreement for the services of an attorney, at an annual salary, appears to me to constitute the relation of employer and employed for not less than a year; and the breach shows that this relation was put an end to, contrary to the contract so understood.

*** 656** It follows, according to the general law *relating to contracts, that an action lies for this breach of contract as soon as it has taken place; and that the measure of damage is an indemnity to the plaintiff for his loss by the breach. It has been contended, on the authority of *Aspdin v. Austin*¹ and *Dunn v. Sayles*,² that, in cases of contracts for service and for salary during a time, the employer may put an end to the employment before the time has expired, and is not liable to any action if, at the period for payment of salary, he pays the amount. But I presume that no such general doctrine was intended to be laid down at the time when the Court put a construction upon the contracts in those two cases. If it was, I must express my dissent from it.

When this relation is determined, the party employed is at liberty to find other employment; and if other equally eligible employment is at his option, the indemnity for the loss by breach of contract would be a small amount; but if the circumstances are reversed, the employment under the contract may be such that the damages may exceed the salary.

MR. BABON PLATT. — The count in this case is framed in assumpsit upon mutual promises. It begins by stating a mutual contract between the plaintiff and the defendants; the defendants engaging that the plaintiff, as their attorney and solicitor, should

¹ 5 Q. B. 671.

² 5 Q. B. 685.

receive, and the plaintiff engaging that he should accept, a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs ; and that he should and would, for such salary of 100*l.* per annum, perform certain services when required. This agreement appears to me to have clearly established the relation of employer and employed * for the period of a year, at a salary of 100*l.* * 657 But it is urged that the agreement, so stated, does not justify the mutual promises, as laid, and that the consideration for the promise of the defendants being executed, the plaintiff could not append to their promise to fulfil the agreement on their part, a promise to retain and employ him as such their attorney and solicitor on the terms aforesaid. It however seems to me, that the promise to retain and employ results by legal implication from the terms of the agreement, and that its introduction operates as a mere repetition of matter contained in the general expression immediately preceding it, and does not therefore vitiate the count. I have used the word "employ" in the sense adopted by the Court of Exchequer Chamber. If this construction of the contract, and the implication from it, is correct, the breach is well assigned, and the count is good in substance ; but if the allegation of mutual promises cannot be supported, it may be rejected as surplusage. The remainder of the count would then show the contract, the plaintiff's readiness to perform his part of it, and the breach of it committed by the defendants, in wrongfully, and without reasonable cause, dismissing and discharging the plaintiff from his employment and retainer, and refusing to pay him his salary.

My answer, therefore, to the question proposed by your Lordships is, that upon a count in the form of the second count set out in this record, a plaintiff in the Courts of law would be entitled, after verdict, to judgment.

MR. JUSTICE MAULE. — In order to answer this question, it is necessary to consider whether the breach of promise, in not continuing to retain and employ the plaintiff as attorney and solicitor, but dismissing him, is a breach of any promise which the count shows the defendants to be bound by, so as to give * the plaintiff a cause of action against the defendants. * 658 That this dismissal, and not the nonpayment of the salary (which is also alleged in the count) is the only breach and cause of action (if any) contained in the count, there is no doubt. It

was so agreed in the argument before this House, and in the Courts below. It is therefore not necessary to say any thing in proof of that proposition. The breach being so understood, it was objected to this count (among other things) that the promise to retain and employ the plaintiff being founded on an executed consideration, i. e. on the agreement made before the promise, is without sufficient consideration, not being such a promise as the law would imply from the consideration, or, which is the same thing (when the consideration is a preceding agreement), not being comprised in the agreement itself. It was not denied that such was the rule with respect to promises on executed considerations, and as it is a rule well established by decisions, it is not necessary to give any reasons in its support, or to say any thing to show it to be a good and useful one.

On this part of the cases it was further agreed that the agreement, as stated according to its legal effect in the declaration, does not contain any promise to employ the plaintiff in the sense of giving him work to do. But the defendants insisted that the promise to retain and employ, as stated in the declaration, did not comprehend any obligation to give any work to the plaintiff to be done, but only meant that the defendants would continue the relation of attorney and client between the plaintiff and themselves, giving him business to do or not, as they pleased, but paying him his salary while that relation should continue. And this promise, that is, to retain and employ in this sense, it was said was comprehended in the agreement, and therefore implied by law from the fact

* 659 of making the agreement. * What "chiefly weighed" with

the Exchequer Chamber when it adopted this construction was, that it supported (as that Court held) the declaration ; whereas the other construction, which treats the word "employ" as comprehending giving work to do, would (as it was insisted by the defendants, and admitted by the plaintiff and the Court) make the declaration bad. And there is no doubt that it is a rule of construction, that of different meanings of a pleading which is susceptible of more than one, that is to be adopted, after verdict, which will support the pleading. And it may further be conceded, that the word "employ" is sometimes used in the sense which this construction gives it, though it may be questioned whether this word can properly be understood in this sense on the present occasion. So to understand it will render wholly inoperative the

promise to retain and employ, which is stated as an additional and distinct promise beyond that to perform the agreement, but which this construction treats as comprehended and involved in the promise to perform the agreement. And, further, this sense is not consistent with the allegation in the declaration, which states as a consequence of the dismissal, not only the loss of the salary, but of the gains and profits which the plaintiff otherwise might and would have derived from such employment. This allegation, it is true, is not necessary to show a cause of action ; and the plaintiff might succeed without proving it ; but it is not the less effectual in showing that the word "employ" is used in the sense usually given to it, and not in that which the construction in question ascribes to it. If this be the true sense of the word, as used in this declaration, the count is undeniably bad.

But assuming that the word "employ" may, notwithstanding these reasons, be construed in a sense in which it does not add any thing to the promise contained in the *agreement, * 660 and that the declaration may be construed as if it contained no promise but that to perform the agreement, it is still to be inquired whether the declaration so construed will show a cause of action. This is indeed the substantial question in the cause, and is in effect this, whether the agreement stated in the declaration obliges the defendants to continue the relation of attorney and client between themselves and the plaintiff for a year. And this depends upon the true meaning of the agreement as stated in the declaration. Now it is to be observed, that that agreement does not in terms provide that the plaintiff shall act as the defendants' attorney, or that they should employ him (in any sense of that word), but begins by providing that from the 1st of January the plaintiff, as attorney and solicitor of the defendants, should receive and accept a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business. It then goes on to show what shall and what shall not be general business within the meaning of the parties ; that is, that certain attendances shall be, and business about suits at law, &c. shall not be, general business to be paid for by the 100*l.* And this is all that the agreement contains. The plain object, therefore, of the agreement appears to be the substitution of a new mode of payment as to certain business for a mode previously acted upon, or intended, or agreed on, or contemplated between the plaintiff and the defend-

ant. And this object, and this only, it appears to effect, leaving every thing else in the relation between the parties as it stood before the agreement, or entirely at large, if no relation at all subsisted. On this view the meaning of the agreement is, that the plaintiff, if he continue the service a year, shall be paid 100*l.* for his general services; but if he do not, his right as against the defendants, and theirs against him, remain to be regulated by any other agreement which may have provided for such

* 661 *an event, or by the general law as applicable to the transactions which have taken place between them. That the

agreement contemplates the possibility or the probability that the plaintiff may continue in the service of the defendants for a year, or for a number of years, there is no doubt. It certainly provides for that event, and indeed for no other; but it by no means follows that it was the intention of the parties to bind themselves by this agreement that such an event should take place. There are no words importing such an obligation; and it would manifestly be inconvenient that any such obligation should exist in the absolute and unqualified form in which (if at all) it must be considered as contained in this agreement. Nothing is more common than to make an agreement in the expectation that a certain state of things will arise or will continue, and with provisions and stipulations applicable to such expected continuance, and which cannot take effect in any other event, yet without any intention that the parties shall be bound to continue the contemplated state of things. The cases of *Aspdin v. Austin*¹ and *Dunn v. Sayles*² are instances of agreements in which a certain duration of the relation between the parties was contemplated and provided for, without binding the parties to continue it for the time contemplated. But probably the case in which an alteration in the amount or mode of payment, and that alone, is intended, is of the most frequent occurrence of this class of agreements; and, as before observed, the agreement in question apparently contains no other provision. If the agreement had been intended to provide for the continuance of the engagement, it is difficult to conceive that it would not have contained express and detailed provisions on the subject, and particularly some provision for putting

* 662 *an end to the engagement by notice or otherwise. The inconvenience of the defendants being bound at all events

¹ 5 Q. B. 671.

² 5 Q. B. 685.

(if not to use the actual services of the plaintiff) at least to hold him out as filling a confidential situation in their service for a year, or indeed (as the agreement contains nothing to restrict the employment to one year, nor any power to put an end to it) for an indefinite number of years, and themselves to carry on their business for the same time, is of the same nature as the inconvenience relied on by the Court of Queen's Bench in the cases cited. The present case was, indeed, distinguished in the Court of Exchequer Chamber from those in the Court of Queen's Bench, as regards the argument from inconvenience, inasmuch as it is said by the Court that the defendants "were a company which was sure to continue for the term of a year." But this distinction does not appear to be well founded. If this particular company had been one that was sure to continue a year from the time of the agreement, this is a fact not apparent on the record; and supposing the Court to have been well assured of this fact by some other means, it cannot properly be taken into consideration in deciding whether this count is good or not; nor can it be said that joint stock companies in general are sure to last a year from the time of making an agreement respecting the employment of an attorney, or from any other time, so as to enable the Court to notice this as a matter of general notoriety. The experience of Courts of justice in winding-up cases, and others in which such companies are concerned, is sufficient to show that nothing certain can be affirmed with regard to their probable duration.

Considering, therefore, this agreement to be one merely regulating the mode of payment of the plaintiff, and not binding either party in any other respect, it follows that it imposes no such obligation as the breach in this count *assumes to *663 exist, and consequently that the count shows no cause of action, and that a plaintiff in the Courts of law would not be entitled, after verdict, to judgment upon a count in the form of the second count set out in this record.

MR. JUSTICE COLERIDGE. — In answer to the question proposed by your Lordships, I have to express my opinion that, upon the second count of this declaration, a plaintiff in the Courts below would be entitled to judgment after verdict; and as my opinion turns upon the construction of the count itself, and I do not controvert the principle on which the judgment of the Common Pleas

on the principal case proceeded, but its application only, I need not express myself at any great length.

The question, then, on this assumption is, whether the defendant's promise, as alleged in the declaration, goes beyond that which the law would imply from the executed consideration on which it is founded ? Now, that will depend on how much the law would imply from that consideration, and how much the declaration alleges to have been in fact promised. The agreement between the parties, a mutual act in which both concur, is to this effect : Elderton, as the attorney and solicitor of the defendants, is to receive from them, and they of course to pay him as such, a salary of 100*l.* per annum, and for that salary he is to advise and act for the defendants on all occasions, in all matters connected with them ; but the prosecution and defence of suits, the preparation of bonds or other securities for advances made by them, and disbursements of money by him, are excepted ; and in respect of such matters he is to be allowed to make, and they of course en-

gage to pay, the usual and regular charges of an attorney

* 664 or solicitor. * Now it seems to me clear, that the parties contemplated here an agreement to subsist for a year cer-

tain at least, subject, of course, to determination in case of plaintiff's misconduct or neglect, or any such adequate cause for discharge. The stipulation is for a salary of 100*l.* by the year, not at the rate of 100*l.* for a year ; and it is unreasonable to infer that any less period of duration, or no period at all, was contemplated, when an attorney agrees to forego the ordinary and more lucrative mode of payment, for services to be rendered from time to time as such, and accept in lieu thereof a fixed sum. Next, I think it clear that the agreement binds the defendants during that year, not indeed to prosecute or defend suits, or to make advances which would require the preparation of bonds or other securities, in order to find work for the plaintiff ; but in case such suits should arise, or such securities be required, then to use the services of the plaintiff, as their attorney and solicitor, in the prosecution or defence, or the preparation of them respectively, and then to pay him the usual and regular charges of an attorney and solicitor. The whole agreement is to be taken together, and the employment in the excepted cases, should they arise, with the permission in those to make the usual charges, may reasonably have been the inducement to consent to forego that mode of charg-

ing for the services specified in the earlier part. No man, I think, but one conversant with the astute criticism which lawyers sometimes exercise on language, could doubt that this was the meaning of the parties. Suppose it had been distinctly stated to the plaintiff, "If there are suits to be prosecuted or defended during the year, and we use you as our attorney therein, you may charge in the usual way ; but, remember, we do not engage so to employ you " ; it is clear, not only that a very different and less advantageous agreement would have been presented to him for acceptance, but also one which * would have made it quite unnecessary to introduce any stipulation at all as to the mode of payment. For these suits, and the preparation of bonds and securities, being excluded from those services for which the salary was to be paid, and employment in them, if they arose, being by the hypothesis to depend on the will of the defendants, as the case might arise, there could be no pretence for saying that the salary was to include them, or that any other than the usual rate of charge was to be made and paid, unless, as each case arose, a specific bargain should be made. I think Courts of law should expound the language of agreements not strainedly, or with over-refinement, but as closely as they can, putting themselves into the situation of the parties, according to what they believe to have been their intention and understanding in the language they have used.

This being, in my view of it, the sense of the agreement, what is the promise founded on it ? It is, that "the defendants are to perform and fulfil the same in all things on their part, and to retain and employ the plaintiff as such attorney and solicitor of the said company on the terms aforesaid." The latter clause of this sentence is said to raise the difficulty ; but either it expresses no more than is expressed by the former branch, or it adds something to it. If it adds nothing, it is merely tautologous, and will do no harm. And this is my view of the case ; for I think there was an agreement by the defendants so to retain and employ the plaintiff as attorney and solicitor in the only sense in which such an agreement could ever be reasonably made, that is, if they should have occasion for the actual services of any one as such. And this seems to me to be all that these words import. I think, if any one of your Lordships had promised to retain and employ A. B. as your attorney for a given time, you would be surprised to be told that *your promise was broken, * 666

unless you had a suit or suits pending during the whole of that time. On the other hand, if during that time you were asked who was your attorney, in other words, whom you employed as such, you would have no difficulty in answering that, in consequence of a promise you had made, A. B. was your attorney, or that you employed A. B. as such. But if these words express more than the first branch of the sentence, as I agree that that branch exhausts all the agreement between the parties, then the agreement must mean less than I supposed it to mean. Holding, however, the conclusion which I do as to its meaning, I think the promise is not too largely laid, though it might have been more briefly expressed.

MR. BARON PARKE.—In answer to the question proposed by your Lordships, I have to state my opinion that the plaintiff, in the Courts of law, would be entitled to judgment upon a count in the form of the second count set out in this record.

The substance of the question in the case lies in a very narrow compass. Assuming that the alleged promise "to retain and employ" cannot be held valid on this count, unless it is implied in the agreement previously stated, the question is this: In a mutual agreement between the plaintiff below (an attorney and solicitor), on the one hand, and a life and fire assurance annuity company on the other, the terms of which are, that it is agreed between them that the plaintiff, as the attorney and solicitor of the company, should receive and accept a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business done for the company, and should, for such salary of 100*l.*, advise and act on all occasions (with certain exceptions), is

it or is it not implied that the company did hire him *667 for one *year certain? I must say I feel no doubt in

giving the opinion that it is so implied. The term "it was agreed" makes the words of the agreement those of both parties; and where two parties agree that one shall accept and receive a yearly salary of 100*l.*, as attorney and solicitor of the other, and for a particular class of business, it is necessarily implied that the other shall pay it, and at the end of the year. It is not to be paid, simply and at all events, at the end of the year, but as a reward for the services of the other as an attorney and solicitor, for his attendance and advice when required, and

being ready to give it whenever it shall be asked, at all times during that year. In this respect, the agreement being by both parties, the present case is distinguishable from *Sykes v. Dixon*.¹

So far, if I correctly understand, the parties do not differ. But the defendants contend, that the only agreement to be implied on their part is, that they will pay the 100*l.* at the end of a year, for the services of the plaintiff as attorney and solicitor, in the matters specified in the agreement; and that they do not hire, or, in other words, agree to retain him in their service in that character in the mean time. On the other hand, the defendant in error contends that in such an agreement there is also implied a hiring, or agreement to retain in that character for a year; and I am of that opinion. I think that there is clearly implied on the part of the person who contracts to pay a salary for services for a term; a contract to permit those services to be performed, in order that the stipulated reward may be earned, besides an agreement to pay the salary at the end of the term. It seems to me that this is clearly an agreement to retain for a year certain; and the only doubt I have felt since the case was first argued in the Exchequer Chamber has been, * whether there was an implied agreement to employ the plaintiff. There is not, if that term is used in the sense of giving him business to do, for no such obligation is cast on the company; but if it means only to engage his service (one of the meanings of that term given in Johnson's and Webster's Dictionaries), there is an implied promise to that effect. The employment in many capacities may be said to continue, where the use of actual service is optional or conditional on the part of the employer. Medical advisers, members of theatrical establishments, even some descriptions of household servants, may be employed at annual salaries, though no actual service may be ever required. It is not those only who are actually called upon to perform duties, but those who are under an obligation to perform them, who are employed.

I think, for the reasons explained in the judgment of the Exchequer Chamber at more length,² that we ought to understand this expression in that sense of the word "employed" which will support it; and "employ," therefore, means only "to retain" in their service, and is mere tautology. The distinction is very important indeed, between an agreement to retain and employ, in

¹ 9 A. & E. 693.

² 6 C. B. 177.

the sense before referred to, for a given term, and then to pay for services at the end of the term, a sum certain, and simply to pay a sum certain for services at the end of a given term. In the former case the person employed has an immediate remedy the moment he is dismissed without lawful cause, for a breach of the contract to retain and employ, and will recover an equivalent for the breach of the employer's contract, which may be less than the stipulated wages payable at the end of the term, if it

happens that he has the opportunity of employing his time

* 669 * beneficially in another way, and the employer is not bound to pay the whole agreed sum. But in the latter case, that is, if the agreement is that the person retained is to be paid a certain sum for his services at a certain time, provided he serves, there being no contract to retain and employ during the term, he can only maintain an action after that time has arrived, for nonpayment, and then is entitled to recover the full amount, though his loss may be much less. Convenience is decidedly in favour of construing such agreements to be contracts for retaining as well as for the payment of wages.

There are certainly cases where, in construing contracts between the employers and the employed, where payments at certain times are stipulated to be paid for services, the Courts have not been able to put such a construction upon them; and where they have held, that the contract imported only an agreement to give certain sums at certain times. Two cases of this description were those of *Aspdin v. Austin*¹ and *Dunn v. Sayles*.² Both these are clearly distinguishable.

In the former the question turned upon the construction of a contract on the part of the plaintiff to make cement for the defendant and one Sealey, and to teach them how to do so; and on the defendant's and Sealey's part to pay a weekly salary for three years; and the point was, whether there was an implied contract to continue to employ him to manufacture cement for that period. The Court could not draw that inference, and Lord Denman, in giving judgment, assigns a very strong reason for refusing to do so, viz. that the defendant would in that case be obliged, at however great loss to himself, to continue his business for three years.

* 670 * The Court, therefore, construed the contract to be a

¹ 5 Q. B. 671.

² 5 Q. B. 685.

contract only to pay sums at the stated periods for three years, on condition of the plaintiff's performing the conditions precedent ; and he would be entitled to recover them on being ready and willing to perform those conditions, being prevented by the defendant's act from so doing.

In the other case, which depended on the construction of the defendant's covenant in an indenture, the term, " it was agreed," which would make the stipulation the agreement of both parties, was wanting. It was a simple covenant by the defendant, who, in consideration of the services of the plaintiff's son as an apprentice to the defendant, a surgeon dentist, covenanted to pay weekly sums for five years. The reasons assigned in the former case equally applied to that, as Lord Denman observed ; and indeed it would be a strong thing to imply that the plaintiff, who had only covenanted to pay certain sums weekly, thereby impliedly covenanted to carry on the business of a surgeon dentist, at whatever loss or inconvenience to himself, for five years.

A case to the contrary, of a special contract, where the Court held that there was an agreement to employ for seven years, was *Pilkington v. Scott.*¹ In the present case, we have to construe the mutual agreement of two parties expressed in the words of both ; and we must assume that we have all the agreement before us, which is the consideration for the mutual promises ; one a company for life and fire assurance and the grant of annuities, which must necessarily have been sure to continue, in the contemplation of both parties at least, whether in fact or not, for a much greater time than a year ; the other an attorney, whose advice and assistance would, without doubt, be often required in the conduct of such a business.

* I feel quite satisfied that in such a case as this there is, * 671 upon the true construction of this agreement, an implied agreement upon the part of the defendants below to retain the plaintiff, and to employ the plaintiff in the sense in which I understand this word, for one year at least.

It is, however, suggested that the purport of the agreement is only to vary the remuneration of the plaintiff, and change it from an annual bill of costs to an annual salary ; the employment of the attorney being for an indefinite time. I do not think that this can be inferred from the agreement stated in the second count. The

¹ 15 M. & W. 657.

annual bill, as well as the annual salary, equally refer to an employment at least for one year; and the agreement in the first count (supposing it could throw any light upon the construction of that in the second) cannot be referred to for that purpose. The question is on the contract in the second count only, and the existence of that in the first count is negatived by the issue on *non assumpsit* as to that count being found for the defendants.

The assessment of damages at the large sum of 200*l.* for the breach of the contract to retain and employ was mentioned in the course of the argument at your Lordships' bar, to show that the word "employ" must have been understood on the trial in a different sense to that which is attributed to it in the Court of Exchequer Chamber, and held to mean the supplying the plaintiff with business. But this is a mere conjecture. If it is well founded, or the damages are excessive, an application should have been made to the Court of Common Pleas for a new trial. In the present stage of the cause, if the count is sufficient in point of law, the amount at which the damages are assessed is perfectly immaterial.

* 672 Therefore I think that the second count is good, and * that the plaintiff below would be entitled to judgment upon it.

August 12.

LORD TRURO, having stated the pleadings and verdict, said: In the Court of Common Pleas, the judgment was arrested after verdict, the count having been held bad upon the ground that it alleged an entire promise on the part of the company to perform the agreement, and to retain and employ the plaintiff as attorney and solicitor of the company on the terms of the agreement, and that there was no sufficient consideration for that part of the promise which alleged a promise to retain and employ the plaintiff, it being held by the Court that the language imported an obligation to furnish actual employment to the plaintiff in his profession of an attorney, and that inasmuch as the consideration set forth was in the past tense, that the plaintiff had promised to perform his part of the agreement, which consideration being a past or executed promise, was exhausted by the like promise of the company to perform the agreement, and did not enure as a consideration for the additional part of the promise alleged to retain and employ the

plaintiff in the sense before mentioned, as also to perform the agreement.

A writ of error was brought upon the judgment of the Court of Common Pleas, and the Exchequer Chamber gave judgment, reversing that decision, and held that the legal effect of the agreement was, that the company promised to retain and employ the plaintiff as its attorney and solicitor for an entire year, in the sense, not of finding actual employment for the plaintiff, but of continuing the relation of attorney and client for a year, at the stipulated salary ; and that the allegation of the promise to retain and employ the plaintiff upon the terms of the agreement, was * in effect no more than a reiteration of the promise * 673 to perform the agreement, and that such words ought, therefore, to be rejected as surplusage ; and in that view the consideration alleged was sufficient to support the premises.

Upon this judgment of reversal a writ of error was brought in Parliament, and the case has been argued at your Lordships' bar ; and upon the part of the plaintiff in error it has been contended that the construction put by the Court of Common Pleas on the promise to retain and employ the plaintiff was consistent with the true legal import of the words, and that no sufficient consideration was averred to support the promise understood in its proper sense, and the special damage alleged was referred to as furnishing proof that the pleader had averred the promise to " retain and employ " in the sense which the Court of Common Pleas had attached to it. The special damage alleged was not only the loss of the salary, but also the loss of the profit which would have been earned by the preparation of securities and conducting suits and defences.

It was further argued, that although the allegation of special damage, which in law was not referable to the promise or the breach of it, would be mere surplusage, and furnish no matter of objection, yet it might be referred to for the purpose of explaining the sense in which an averment in the declaration, expressed in equivocal words, was intended to be understood.

Further, it was contended that if the promise " to retain and employ " meant no more than to continue the relation of attorney and client for the year, and to pay the 100*l.* salary at the end of the year, then no sufficient breach was assigned, the breaches assigned being, first, the refusal, in the middle of the year, to con-

tinue to retain and employ the plaintiff; and secondly, to pay the salary.

With regard to the refusal to continue to retain and * 674 * employ, it was said that such refusal gave no cause of action, because it could occasion no actual or implied damage to the plaintiff, as such continuance to retain and employ him was not necessary to entitle him to the salary of 100*l.*; that it was sufficient so to entitle the plaintiff that he should continue in a situation capable and ready to be employed if called upon to perform service; and that in regard to the nonpayment of the salary, the nonpayment was not averred, but only a refusal to pay, which, it was contended, was not equivalent to an averment of nonpayment; and as to the alleged loss of the gain and profit which would have been gained by him in the prosecution and defence of suits, and the preparation of securities, both Courts had concurred in the opinion that that agreement did not create any obligation upon the company to furnish such employment, and that it could only be referred to, as before mentioned, to explain that the averment of the agreement of the company to retain and employ was used in the sense of furnishing the plaintiff with actual employment as an attorney.

Upon the part of the defendant in error, it was answered that the objections urged by the plaintiff in error were founded upon a misconstruction of the words "retain and employ," which, it was contended, did not import an obligation to find actual work for the plaintiff to do, but only to retain and employ the plaintiff in the sense of continuing the relation between him and the company of attorney and client for the year, and that the untimely and unjustifiable dissolution of that relation within the year was a refusal to retain and employ the plaintiff, and gave an immediate cause of action; and that the breach was well assigned by the allegation of the refusal of the company to retain or employ the plaintiff on the terms of the agreement, or to pay him his salary of 100*l.*;

* 675 and that the special damage averred was * immaterial, and could not affect the question, whether the promise and the breach were well pleaded.

The case, therefore, resolves itself into the question, What is the legal import of the averment that the company promised to perform the agreement, and to retain and employ the plaintiff for a year upon the terms of the agreement; — whether the words

import a contract beyond the strict legal effect of the agreement itself? If they do not, the mutual promises to perform the agreement are a sufficient legal consideration to sustain the count.

Your Lordships were therefore pleased to put the question to the learned Judges, "Whether the plaintiff would be entitled, after verdict, to judgment in the Courts below, upon a count in the form of the second count set out in this record?"

Eight of the learned Judges have stated their opinions to be, that the plaintiff would, in the Courts of law, be entitled, after verdict, to judgment, upon a count in the form of the second count set out in this record. One of the learned Judges has expressed a contrary opinion.

The case now remains for your Lordships' judgment; and although I am strongly impressed by the reasons assigned by the learned Judge whose opinion is adverse to the validity of the count, and I should myself have been well content to have acted upon that opinion, yet I think that, from the respect due to the opinions of the learned Judges, and to the reasons by which those opinions are supported, considering the question to be one of construction and pleading, with which those learned Judges are peculiarly conversant, I cannot but advise your Lordships that the safer course will be to act upon the opinions of the eight learned Judges, and to affirm the judgment.

I cannot, however, omit to observe that the record furnishes strong grounds for believing that the sense which * the single learned Judge, whose opinion is against the validity of the count, has ascribed to the promise to "retain and employ," in the sense in which the averment was intended to be understood, that is, that the agreement created an obligation upon the company, not only to perform the agreement by retaining the plaintiff for a year as the attorney and solicitor of the company, at the salary of 100*l.* a year, but also to retain and employ him to prepare the securities referred to, upon the terms of being paid professional charges in those respects, is correct. I think that the Judge at Nisi Prius must have so construed the promise, as the plaintiff actually recovered damages for the breach of the agreement in that sense, although the declaration is now held valid only because the eight learned Judges reject that construction.

That the pleader inserted the averment in the repudiated sense is apparent from the form of the breach assigned, because, after

alleging a breach of the agreement by the company in dismissing the plaintiff, and refusing to employ him as attorney and solicitor for the company for a year, or to pay him his salary, the declaration alleges that he was thereby deprived of his salary of 100*l.*, and was also deprived of the gains and profits which he would have derived from such employment in and about the prosecuting and defending of divers suits respectively brought by and against the company, and in and about the preparing of divers bonds, contracts, and securities for the company ; and further, the declaration alleges that part of the salary of 100*l.* had been paid before the commencement of the action ; so that if the promise was only to retain and employ the plaintiff for a year at a salary of 100*l.*, the plaintiff's claim to damages was limited to the amount of the balance of the salary of 100*l.*, yet the plaintiff has obtained a verdict for 200*l.* damages, to which he could only be

* 677 * entitled provided the promise alleged in the declaration was to be treated as a promise, not only to retain him for a year at 100*l.* salary, but also to furnish him, in addition, with profitable employment.

It is possible, however, that the pleader might contend that the allegation of a promise to "retain and employ" was used only to explain that the promise to perform the agreement was, in legal effect, a promise to retain and employ the plaintiff as attorney for the company for a year, and that the special damage, by the loss of the profit of prosecuting and defending actions, and of preparing securities, meant only that the plaintiff, by his dismissal from the service of the company, lost that probable chance of employment to prosecute and defend suits in which the company should be a party, and of preparing securities, which he would have enjoyed if he had been continued in the service of the company for the year, and that the jurors were warranted in adding to the balance due in respect of his salary, some damages, by way of indemnity, for the loss of that contingent employ which was incidental to his character of attorney for the company. The case, however, has not been presented to your Lordships in that view, and the cause is now before you in the position of the record, containing a contract, ambiguous in its terms, which, being understood in the sense in which alone the plaintiff would be entitled to a judgment in his favour, his right to damages could not amount to 100*l.*, and he has recovered a verdict and costs for a judgment for

200*l.* damages, to which he could alone be entitled provided the contract averred is to be understood in the sense which the plaintiff repudiates, and which the eight learned Judges say cannot legally be ascribed to it. Injustice, therefore, has manifestly been done; your Lordships can afford no relief against that injustice; but I should have thought that for such an incongruity upon the * face of the record some remedy might have * 678 been found, either by a *venire de novo*, if the plaintiff refused to remit the amount of the excess of damages, or by some other means; and unless the Court of Common Pleas can exercise a summary jurisdiction in staying the proceedings upon the payment of the balance of the 100*l.* salary and costs, the injustice is irremediable.

Your Lordships cannot, I think, do otherwise than affirm the judgment, because it is a clear rule of law, that if a declaration contains allegations capable of being understood in two senses, and if understood in one sense it will sustain the action, and in another it will not, after verdict it must be construed in the sense which will sustain the action.

Judgment affirmed, with costs.

Lords' Journals, 12th August, 1853.

1852. February 16, 17; June 25. 1853. August 12.

JOHN GOSLING, *Plaintiff in error.*

AUGUSTUS CHARLES VELEY, *Defendant in error.*

Church Rates. Church-Wardens. Vestry. Majority and Minority.

In the Ecclesiastical Court the onus of proving a rate to have been rightly made lies on those who assert its validity, and if that validity is not affirmatively established, the Common Law Courts will prohibit the enforcement of the rate. An order of the Ecclesiastical Court to admit a libel and exhibits to proof is not a definitive sentence.

It is the duty of the parish to repair the fabric of the parish church, and the neglect or refusal to perform this duty will subject those who so neglect or refuse to punishment in the Ecclesiastical Court.

A valid church rate can only be made by an actual or constructive majority of the parishioners in vestry assembled, and if the majority should refuse to make a rate for the purpose of discharging this duty, such refusal would not entitle the minority to make the rate.

An irrelevant vote on a proposition submitted to a vestry meeting does not prevent those who gave it from afterwards voting on any other proposition relating to the same subject proposed at the same meeting. Therefore:—

A resolution passed by the majority in vestry to declare that no church rate is necessary, and to refuse any such rate, does not disentitle the persons composing that majority to vote upon the question of any particular proposal for a rate made by any of the minority; and if a rate should be made by the minority alone, the votes of the other persons present not having been taken on it, such rate will be bad.

At a vestry meeting assembled under a monition from the Ecclesiastical Court to consider of and make a rate for the repairs of the parish church, an estimate was produced by the church-wardens, and a rate of 2s. in the pound proposed by them. No objection was made to the estimate, but an amendment was passed by the majority that church rates were bad in principle and ought to be refused, and the vestry did refuse to make a rate accordingly. The vicar, church-wardens, and certain others of the vestry, without taking any vote on the question, did afterwards produce and sign a rate of 2s. in the pound:—

Held, that the rate thus agreed to was invalid.

*680 *In a suit to enforce such rate, the libel, after setting forth the refusal of the majority to make the rate, contained this allegation: "The church-warden proposed addressing himself to those rate payers who were willing to obey the monition, that a rate of 2s. in the pound should be made by them, and a rate of 2s. in the pound is produced and signed by the vicar, the two church-wardens, and several rate payers present. The mover of the amendment protested," &c.

Semble, that this allegation showed the rate to have been made by the minority; but,—

Held, that to sustain the suit, the libel must show the rate to have been made by the majority of the vestry; for that no other rate is valid.

THIS was a writ of error on a judgment in prohibition. The declaration in prohibition set out all the proceedings in the case. Gosling was an occupier of lands within the parish of Braintree, in the county of Essex; Veley was one of the church-wardens of that parish.¹ In January, 1842, Gosling was cited in the Consistorial and Episcopal Court of London for subtraction of church rates. The libel alleged that the parish church of Braintree was, and long had been, in urgent need of repair; that no church rate had been granted or collected since March, 1834; that on several

¹ Mr. Joslin, the other church-warden, died after the commencement of the proceedings.

occasions a church rate had been refused in vestry ; that, after other proceedings had taken place (which the libel set forth),¹ a monition was issued, in obedience to which a vestry assembled, on the 15th July, 1841, at which the Rev. Bernard Scale, the vicar of the parish, was present and took the chair ; that the monition and the notice convening the meeting were read ; that a survey of the * repairs and an estimate of the expenses * 681 were produced and read by the church-wardens ; that the necessity for such repairs was not denied ; that Veley proposed a rate of 2s. in the pound, which motion was seconded by Richard Lacey, a parishioner ; that thereupon an amendment was moved by Samuel Courtauld, and seconded by Edward George Craig, two other parishioners, to the effect following : "That all compulsory payments for the support of the religious services of any sect or people appear to the majority of this vestry to be unsanctioned by any portion of the New Testament Scriptures, and altogether opposed to, and subversive of, the pure and spiritual character of the religion of Christ. But that for any one religious sect to compel others, which disapprove their forms of worship or system of church government, or which dissent from their religious principles and creeds, to nevertheless submit to, support, and extend them, appears to this vestry to be a yet more obvious invasion of religious freedom and violation of the rights of conscience ; while also it appears to be a gross injustice to Dissenters, as citizens, to compel them to pay for the religious services of others, in which they have no part, while they build their own chapels, support their own ministers, and defray the charges of their own worship. That compulsory church rates, and more especially such rates upon Dissenters, thus appearing to be, as a tax, unjust, and as an ecclesiastical imposition, adverse to religious liberty, and contrary to the spirit of Christianity, this vestry feels bound, by the highest obligations of social justice and of religious principle, to refuse to make a rate, and does refuse accordingly."

The libel then went on to state that a show of hands was taken upon this amendment, and a great majority of the parishioners and rate payers then present was declared by the chairman, as the fact was, to be in favour of the amendment, * which * 682 was thereupon declared to be carried ; and no person then

¹ See all these proceedings, which are not necessary for the report of the present case, fully stated 7 Q. B. 406.

and there demanded a poll on the amendment, or asserted or intimated that the same was not duly carried. " That immediately after the premises then next before pleaded, and while the said parishioners still continued as aforesaid in vestry assembled, the question was then and there put, whether any other amendment was proposed, or any other proposition as to the amount of rate was made ; that no affirmative answer was returned to such question, nor was any other motion or proposition made for or towards discharging the obligation cast by law and the custom of the realm upon the said parishioners, of repairing their parish church, and of providing necessaries for the decent celebration of divine service and offices therein, and for and towards the other expenses necessary and legally incident to the office of church-warden for their year of office ; that the majority of the said vestry having, by the acts and means aforesaid, refused to furnish the church-wardens of the said parish with the necessary funds as aforesaid, the now defendants, the church-wardens aforesaid, and others of the rate payers and parishioners of the said parish, then and there present in vestry, on the said 15th of July, as thereinbefore pleaded, did, in obedience to the aforesaid monition, and in discharge of the aforesaid obligation, cast upon them and the other parishioners of the parish of Braintree aforesaid, by the law and custom of this realm, at the said meeting of the said parish, and while the parishioners so continued as aforesaid in vestry assembled, rate and tax all and every the inhabitants and parishioners of the parish of Braintree aforesaid, liable to contribute to a church rate, for and towards the necessary repairs of the church of the said parish, and for and towards providing necessaries for the decent celebration of divine service and offices therein, and for and towards the other

* 683 expenses necessarily and legally * incident to the office of church-warden for the current year, the several sums of money mentioned in the said rate, being a rate or assessment of 2s. in the pound on the annual value of all rateable messuages, &c. occupied within the said parish, for and towards the purposes aforesaid ; and that accordingly a rate of 2s. in the pound was then and there produced, made, and signed by the said vicar and church-wardens, and others of the parishioners and rate payers then and there present." ¹

¹ In the minutes of the vestry, which were afterwards set forth as constituting part of the proof of the libel, the mode of making the rate was thus described :

The libel then went on to allege the reasonableness of the general rate, and of the individual assessment on Veley; set forth in proof the minutes of the vestry, and the document alleged to be the rate, which was in the following terms: "We, the church-wardens and other parishioners of the parish of Braintree, in the county of Essex, whose names are hereunto subscribed, do hereby, this 15th day of July, in the year of our Lord 1841, at our vestry meeting for that purpose, duly and legally convened and assembled, in pursuance of, and in obedience to, a monition issuing out of the Consistorial and Episcopal Court of London, rate and tax all and every the inhabitants and parishioners of the parish of Braintree aforesaid, liable to contribute to a church rate, for and towards the necessary repair of the *church of the *684 said parish, and for and towards providing necessaries for the decent celebration of divine service and offices therein, and for and towards the other expenses necessary and legally incident to the office of church-warden for the current year, the several sums of money hereinafter mentioned, being a rate or assessment of 2s. in the pound on the annual value of all rateable messuages, lands, tenements, and hereditaments occupied within the said parish." The usual tabular form of a rate was then added, and it was signed by the vicar, the church-warden, and eighteen inhabitants. Forty-four parishioners, who were not present at the meeting aforesaid, afterwards signed their certificate of approval of the same.

The declaration, having thus fully set out the libel and the proceedings in the Ecclesiastical Court, averred that Veley had there opposed the admitting to proof of the libel and exhibits, alleging that the pretended rate was made without lawful authority, and denying the jurisdiction of the Consistorial Court; that Dr. Lushington, the Vicar-General and Official Principal, had rejected the libel and exhibits; that, on appeal to the Arches Court of Canter-

"Mr. Veley then proposed, on behalf of himself and Mr. Joslin, addressing himself to those rate payers who were willing to obey the monition, that a rate of 2s. in the pound should be made by them, and a rate of 2s. in the pound is produced and signed by the vicar, the two church-wardens, and several rate payers present. Mr. S. Courtauld, as the mover of the amendment, protested, on his own behalf and on behalf of the meeting, against the irregularity and impropriety of the church-wardens attempting to make a rate after it had been refused by a large majority of the vestry, and protested also against the rate so attempted to be made."

bury, his decision had been reversed by Sir H. Jenner Fust, the Official Principal of the Arches Court, and Veley had been assigned to answer to the suit in that Court; that that Court had no jurisdiction in the said matter, but was nevertheless still proceeding in the said cause, and Veley prayed judgment of prohibition to the Official Principal of the Arches Court.

There was a general demurrer to this declaration. Joinder in demurrer.

The demurrer was argued in Hilary Term, 1846, before Lord Denman, C. J., and Justices Patteson, Coleridge, and Wightman,

and in February, 1847, the Court of Queen's Bench pro-
* 685 nounced judgment for the defendants in *prohibition.¹ A

writ of error was brought on that judgment, and was argued in Trinity and Michaelmas vacations, 1848, and in January, 1850, judgment was delivered. The Judges who heard the case were divided in opinion; Mr. Baron Platt, Mr. Justice Cresswell, Mr. Justice Maule, and Mr. Baron Alderson thinking that the judgment of the Court of Queen's Bench ought to be affirmed; Mr. Baron Rolfe,² Mr. Baron Parke, and Lord Chief Justice Wilde thinking that it ought to be reversed. In conformity with the opinion of the majority, the judgment was affirmed.³ The present writ of error was then brought.

The Judges were summoned, and Mr. Baron Parke, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Justice Wightman, Mr. Baron Platt, Mr. Justice Erle, Mr. Justice Williams, Mr. Justice Tal- fould, Mr. Baron Martin, and Mr. Justice Crompton attended.

Mr. Serjeant Byles and *Mr. Mellor*, for the plaintiff in error.— Two points are now submitted to the House,— first, that the minority of the vestry cannot, against the will of the majority, tax the parish, by assessing a church rate, when the majority has voted against any rate whatever. Secondly, that, on an examination of this record, this rate of 2s. in the pound appears to have been made by the minority in the vestry, or at least does not appear to be made by the majority even of those who were willing to make a rate.

¹ 7 Q. B. 406.

² Mr. Justice Coltman, who had heard the case argued, died before the judgment was pronounced.

³ 12 Q. B. 328.

As to the first point, it may be conceded that the parishioners are bound by the common law to maintain the fabric of the church, and that they may be visited with * ecclesiastical * 686 censures if they do not fulfil that obligation. But here arises the distinction which entitles the plaintiff in error to judgment. Though bound to repair the fabric of the church, there is no obligation to make a rate for that purpose. Indeed, it was considered in the Court below, that if the duty was discharged by any other mode than by raising a rate, that would be an answer to the proceedings in the Spiritual Court. There is recent and high authority for saying that originally repairs were to be made out of the funds destined for the support of the ministers of public worship. *Hawkins v. Rous.*¹ It was there declared that, "by the civil and canon law, the parson is obliged to repair the whole church; and it is so in all Christian kingdoms but in England, for it is by the peculiar law of this nation that the parishioners are charged with the repairs of the body of the church." That declaration of the law was cited, and expressly adopted, by Lord Chief Justice Tindal, in judgment in *Veley v. Burder.*² It is therefore clear that the liability of the parishioners, whatever it is, arises not from the canon or civil law, but solely from the common law, by the rules of which it must be governed. No analogy, therefore, which is applicable to the decision of this case, can arise from any other law. The common law was framed in times when all the people of the realm were of one faith. Voluntary contributions were then generally sufficient for the purpose; but if there were any persons found to be backward in rendering assistance, there were two powerful modes of compulsion, — excommunication of the individual, or interdict of the parish. At length the reparation of the church was made legally compulsory.³ If by any of these means the church is repaired, the Ecclesiastical Court * is satisfied. *Methold v. Winne.*⁴ The argument now * 687 used is, that as these ancient modes have ceased to have effect, the law requires that there should be other compulsory means to enforce the performance of the legal duty. That argument is not well founded; but even supposing it to be true, still this is not the proper mode of compulsion. The inhabitants who

¹ Carth. 360, Holt, 139.

² 44 Edw. 3, fol. 18.

³ 12 A. & E. 301.

⁴ 1 Rol. Abr. 393, tit. Church-warden, A. pl. 3, 4.

refuse to pay tithes may be admonished by the Ecclesiastical Court,¹ but no other power can be exercised over them; in like manner they may be liable to ecclesiastical censures if the church is out of repair, but not for not making a rate to repair it.

There is no indictment at common law for not repairing a church, as for not repairing a road. In *Cooper v. Wickham*,² the fact that a church-warden had voted in vestry in favour of a resolution declaring church rates "bad in principle, unjust in practice, and uncalled for at the present time," was held not to constitute an ecclesiastical offence. The Court did not even decide that it would be so if the church was, in consequence of that resolution, still out of repair.

[LORD BROUGHAM.—Because there was no averment to that effect in that libel.]

Refusing to join in making a rate for repairs, or even wilfully obstructing its being made, does not constitute an offence cognizable by the Ecclesiastical Court. *Francis v. Steward*.³ Lord Denman, in delivering the unanimous judgment of the Court in that case, used very strong expressions to show that the parishioners possessed the most perfect freedom in voting against any rate proposed in the vestry.

[LORD BROUGHAM.—You admit that it is compulsory at *688 *common law to repair the church. In what way is the performance of the duty to be compelled?]

There may be difficulties in the way of enforcing the performance of the legal duty, but their existence will not make any proceeding of this kind valid. The Legislature alone can remove the difficulty. A man may be bound to do a certain thing, but not be bound to do it in a specific way. The Court of Queen's Bench will not interfere to compel a vestry to make a rate, for that is not a statutable duty, it is only a subject of ecclesiastical jurisdiction, *The King v. St. Peter's, Thetford*;⁴ but it will interfere to compel the parishioners to assemble in vestry to consider a proposal for a rate, for the assembling of them for that purpose is a statutable duty cast on the parish. *The King v. St. Margaret's, Westminster*.⁵

¹ Conset's Pract. 3d ed. 316, 409.

³ 5 Q. B. 984.

² 2 Curteis, 303.

⁴ 5 T. R. 364.

⁵ 4 Maule & S. 250; see also *The Queen v. St. Margaret's, Leicester*, 8 A. & E. 889.

[LORD BROUGHAM.—So, if a visitatorial power existed, you say that the Court could merely put it in motion.]

Certainly: these cases justify that argument. The power to compel the making of a rate was expressly disclaimed in the judgment of the Court in *Veley v. Burder*, as it had been in the previous case of *The King v. St. Peter's, Thetford*. The Court there expressly said that it would not grant a mandamus to make a rate; and those were cases where the common-law liability clearly existed. In a case of this sort, the utmost extent of the law is, that if the duty is not performed, there is a liability to ecclesiastical censures. *Ayliffe*.¹ Now a man may be bound to do an act, under pain of censure or of damages, but if he will not do it, the censure may be pronounced or the damages recovered, but the act will remain undone. A servant, hired for a year, is entitled to be kept for a year, and to receive * wages for a * 689 year; but if the master will not keep him, but wrongfully discharges him, the servant cannot sue for wages, but must bring an action for damages for the breach of the contract. The difference between the two modes of proceeding is perfectly established.

The argument on the other side defeats it. If the power of punishing the majority exists, then it is impossible that the votes of the majority can be votes thrown away, or that the majority can be treated as if personally absent from the meeting, for then there would be no ground for punishment. *Rogers v. Davenant*² was referred to by Mr. Baron Parke in the Court below, as being an authority to show that a rate made by the minority could not be valid; and it is, indeed, almost conclusive for such a purpose. Lord Chief Justice North there said: “The Spiritual Court may compel parishioners to repair their parish church, if it be out of repair, and may excommunicate every one of them till it be repaired, and those that are willing to contribute must be absolved, till the greater part of them agree to assess a tax; but the Court cannot assess them towards it.” The very expression that the minority must be absolved, shows that there can be no church rate while the majority continues contumacious. It likewise gets rid of the argument that the rate must be made in order that the willing minority may not suffer for the act of the unwilling majority. There is no trace anywhere of a rate made by the minority of a vestry, although there have been church rates since

¹ *Parergon*, 455, 456, ed. 1726.

² 1 Mod. 194.

1370, and although the necessity for so making them has often arisen. Church-wardens have sometimes attempted to make rates as of their own authority, but there is no instance of a rate made by a minority against the declared will of the majority. In *Rogers v. Davenant*, “ Wyndham, Atkyns, and Ellis, Justices, said

*690 * the church-wardens cannot, none but Parliament can, impose a tax ” ; and then, treating a church rate as a by-law, they added, “ but the greater part of the parish can make a by-law,” which shows that, in their opinion, none but the majority can impose the rate, whether it is considered as a tax or a by-law.

The first case relied upon by the other side is that of *Gaudern v. Silby*,¹ but that case is of no authority. The Judge of the Consistory Court thought it an erroneous decision ; but as it was the decision of a Court to which an appeal would lie from the Consistory Court, he declared himself bound by it. It was decided in the Arches Court, in February, 1799. So far as the reports of it can be understood, it appears that the rate there was made by the church-warden out of vestry, and in the Arches Court that was treated as a good rate. Nobody now doubts that such a rate is bad. Another case also relied on is *Anonymous*,² or, as it is sometimes cited, *Thursfield v. Jones*.² That case is in the following terms : “ A motion for a prohibition to a suit in the Ecclesiastical Court for a church-warden’s rate, suggesting that they had pleaded that it was not made with the consent of the parishioners, and that the plea was refused. The Court said that the church-wardens (if the parish were summoned, and refused to meet or make a rate) might make one alone for the repairs of the church, if needful, because that, if the repairs were neglected, the church-wardens were to be cited, and not the parishioners ” ; and so a rule to show cause for a prohibition was granted. The first observation on that case is, that if the word *or* is changed into *to*, in the phrase “ refused to meet or [to] make a rate,” the case is in entire accordance with *Veley v. Burder*.³ If that change is

*691 * not made, but the case is left as it stands in Ventris, then it is distinctly overruled by *Veley v. Burder*. The next matter relied on is the passage in Degge’s Parson’s Counsellor.⁴ That passage is in the following terms : “ And if the parishioners,

¹ 3 Curteis, 272 ; Johnson’s Braintree Case, 103.

² 1 Vent. 367.

³ 12 A. & E. 233, 265.

⁴ Page 204.

when they come together at such meeting, refuse or neglect to join in making such assessment, or refuse to meet, I conceive the church-wardens, having just cause for such assessment, may proceed alone. For if the church-wardens shall neglect to make the repairs, when duly admonished by those that have the power to visit, within a certain time the ordinary or other visitors shall limit, they may proceed against the church-wardens by ecclesiastical censures to compel them to do it; and the law never compels any body to do anything they have not the means to effect." This passage is not an authority for the purpose for which it is cited. In the first place, the expression of opinion is merely argumentative and inferential; in the next, it is clear that the parishioners and church-wardens constitute the vestry, and it is undoubted that they may, if they please, make a rate; but if it means that the church-wardens can make the rate when they are not in vestry, or that the Ecclesiastical Court can appoint any one to assess the quantum, then it is plainly wrong, *Blank v. Newcomb*,¹ and the doctrine it is supposed to assert has been distinctly overruled in the case of *Veley v. Burder*. It may be asked how it came about that those who so long ago invented the scheme of the church-wardens alone making the rate, never till now thought of the minority of the vestry making it. In none of the cases, nor in any passage in Ayliffe, Oughton, or Gibson, where, however, all that can be said in favour of the prerogatives of the Church is carefully preserved, is any thing of the kind suggested.

* The first hint of it came from the Judges in the Exchequer Chamber, in the case of *Veley v. Burder*.² Gibson, indeed, shows that nothing of the sort can be done, for he says:³ " Rates for reparation of the church are to be made by the church-wardens, together with the parishioners assembled upon public notice given in the church, and the major part of them that appear shall bind the parish, or, if none appears, the church-wardens alone may make the rate; because they, and not the parishioners, are to be cited and punished in defect of repairs." He afterwards adds: "The Bishop cannot direct a commission to rate the parishioners, and appoint what each one shall pay; this must be done by the church-wardens and parishioners; and the Spiritual Court may inflict spiritual censures till they do." The reason

¹ 12 Mod. 327, Holt, 594.

² 1 Gibson Codex, 220, tit. 9, c. 4, § 2.

³ 12 A. & E. 308.

given in the earlier part of the section has been decided to be erroneous; but the church-wardens, being themselves parishioners, may, if no other parishioners appear upon due notice given, make the rate, because in truth they themselves, under such circumstances, constitute the vestry. Under no other circumstances can they make it. As church-wardens, it has been decided that they have no such power. *Veley v. Burder*.¹ In Bacon's Abridgment,² it is said: "The church-wardens have no power to make any rate themselves, exclusive of the parishioners, their duty being only to summon the parishioners, who are to meet for that purpose, and when they are assembled, a rate made by the majority present shall bind the whole parish, although the church-wardens voted against it. In *Wheeler v. Lambert*,³ the question was, whether the church-warden had been duly elected;

* 693 * and the Court said that, "so far as the repairs of

the church were concerned, it did not matter whether he was duly elected, or not; that, if the church-wardens do not agree, yet if the majority of the parishioners tax, it is sufficient. Their chief business is to collect the rate." *Waldron's Case*,⁴ often cited as *Anonymous*,⁴ is supposed, but erroneously, to lay down a different rule. There a prohibition was moved against a suit for a rate made by the church-wardens alone, "whereas, by law, the major part of the parish must join. Twisden, J.—Perhaps no more of the parish will come together. Counsel.—If that did appear, it might be something." Properly considered, that case only shows that, where the inhabitants do not assemble upon notice, the church-wardens, who, it must always be recollect, are parishioners, and who do attend at the appointed time and place, will then of themselves, as parishioners, form the vestry, and may make the rate. *Waldron's Case* is a direct authority against an opposite argument. So is *Roberts's Case*,⁵ where, after judgment in the Arches, a prohibition was granted, and "the Court agreed that the tax cannot be made by the church-wardens, but by the greater number of inhabitants it may." *Pierce v. Prouse*⁶ is to the same effect. *Wayte v. German*⁷ will be relied on by the other side, because there a prohibition was refused. The

¹ 12 A. & E. 233.

⁴ Hetley, 61.

² Bac. Abr. Church-warden, C.

⁵ 1 Salk. 165.

³ 2 Keble, 573, 3 Keble, 533.

⁷ 2 Show. 141.

⁶ 1 Mod. 79.

two grounds for the prohibition were merely formal. The decision does not affect the argument for the plaintiff in error, but some observations of Lord Chief Justice North are favourable to it. He observed: "It is said the parish, or some of them, did rightfully make the tax; and can that be understood otherwise than of the major part: and if but forty of the parish appear, the major part may tax the whole parish." That decision, therefore, in fact proceeded on the doctrine that the rate must be made * by the majority present in vestry, and that, as the libel then * 694 stood, it must be construed as alleging that the rate had been so made.

Church rates are the mere creatures of the common law, and their validity must be decided by the principles of the common law. *The Chamberlain of London's Case*¹ and *Jeffrey's Case*.² The first of these principles is, that no tax can be imposed but by a majority of the people's representatives. The same rule affects parishes as well as parliaments. This is the case of a tax, and the great principle of English constitutional law must be applied to its imposition. It is said that that principle is not applicable here, because the voting in vestries upon church rates is analogous to voting at elections for corporate officers or for members of Parliament. The argument on the other side is, that as you must vote for a qualified person under the penalty of your vote being lost, and as the repair of the church is a legal duty which you are bound to discharge, you must not wholly refuse a rate for repairs, for otherwise your vote will be lost, and those persons who vote in discharge of their legal duty will alone be entitled to have their votes counted. There is no analogy between these cases. In voting for a rate, the vestry makes a law; in electing to an office, the electors merely act on a law already made. All aggregate bodies, acting ministerially, can only declare their will in one of three ways,— by unanimous decisions, by an absolute majority, or by relative numbers. Juries must be unanimous; commissioners appointed to discharge a public trust need not be so. *The King v. Whitaker*.³ But there must be a majority in order to render any act effectual. *Blacket v. Blizzard*.⁴ The cases, therefore, of juries and of persons acting under * a private or public * 695 appointment in a public trust depend on different principles.

¹ 5 Rep. 63.

* 9 B. & C. 648.

² 5 Rep. 67.

* 9 B. & C. 851.

Then comes the case of bodies who declare their will by an absolute majority of the persons constituting them. This House, whether acting in its legislative or judicial capacity, declares its will by an absolute majority; and whatever may be the consequence of a vote, or however any vote of either House of Parliament,—as, for instance, a vote of the House of Commons refusing supplies when war was raging,—might injure the interests of the public, or amount to a breach of public duty, it could never be pretended that the votes of the minority could alone be counted, and the votes of the majority treated as thrown away. In like manner it is the duty of the Commons to elect a speaker; but should a majority refuse to do so, or elect an unqualified person,—as, for instance, some one who was not a member of the House,—the votes of the majority could not be treated as null, and the votes of the minority, in favour of a particular speaker rejected by the majority, be alone counted. The third mode of proceeding is by a relative majority, as where there are three candidates at an election, and there are thirty-seven voters, twelve vote for A., twelve for B., and thirteen for C., the last would be elected, because, relatively to the whole numbers, C. would have the majority. The cases where votes are said to be thrown away are those where a duty has to be performed, and can only be performed in one particular way: *Oldknow v. Wainwright*.¹

Where a person is disqualified by law from being a candidate, a vote given to him is thrown away, because in contemplation of law

he was not a candidate: *Taylor v. The Mayor of Bath*;²

* 696 *Hawkins * v. The King*;³ but these persons may vote again if they please to do so. But those cases do not apply to the present, where the vestry is a deliberative assembly, and not a mere electoral college. As a deliberative body, it is not the duty of the vestry to vote for any specific proposition presented to it. Suppose the vestry to decide that there shall be a rate, then arises the consideration of the amount, of the necessity for repairs, of the price at which they can be effected, and of the sum that must be raised for that purpose. As to any one of these questions,

¹ 2 Burr. 1017, 1 W. Bl. 229.

² 3 Luders El. Cas. 324, cited in judgment by Wilde, C. J., *Gosling v. Veley*, 12 Q. B. 414.

³ 2 Dow, 124; affirming the judgment of the Court of King's Bench, 10 East, 211.

the vestrymen have a right to vote as they deem best for the interest of the parish. If they can be punished in the Ecclesiastical Court for not voting the rate, they must submit to the punishment; but the rate cannot be made by any one else against their will.

It does not appear on this record that this rate was put to the vote and was adopted even by the majority of those who were willing that a rate should be made. The allegation merely is, that the paper was signed by the vicar, the two church-wardens, and several rate payers then present. That is not sufficient. This proceeding is invalid, and there is good ground for a prohibition. One of the Judges in the Court below said that there should have been a demurrer to this allegation; but that form is unnecessary in the Ecclesiastical Court, where opposition to proof is equivalent to a demurrer.

The Solicitor-General (Sir W. P. Wood) and Mr. Ogle for the defendant in error.—The first question is, On whom is thrown the onus of showing that the rate is or is not valid? The object of the suit in the Ecclesiastical Court was only to enforce payment * of the rate. It may be that in that Court the * 697 onus of showing the validity of the rate was on those who instituted the suit; here it is reversed, and it lies on those who seek to obtain the prohibition. Such was the distinct and uncontested opinion of the Court of Exchequer Chamber. It has been said on the other side, that the rate is invalid because it does not appear to have been made by a majority of the persons assembled in vestry; but the answer to that is, that it has been duly made, because it was made by all the parishioners assembled at that vestry who legally expressed any opinion on the subject. The vestry being assembled, a proposition was made for a rate of 2s. in the pound. Something called an amendment was then proposed; but it was no amendment, it was a mere argumentative declaration of opinion, and the fact of its being put from the chair did not confer on it the character of a lawful amendment. It did not negative the resolution proposed. A resolution beside the proper business of a meeting is not a resolution of that meeting, it is not a part of the business which the meeting was assembled to perform.

The analogy between this case and the case of an election is very strong. The electors have a certain legal duty to perform.

They must perform it, or their votes are lost. The electors of a borough are assembled to elect a mayor. A. B. is proposed for the office, on which a resolution is proposed that there shall not be any mayor ; that does not negative the proposition for the election of A. B. If carried, it will not interrupt the election, which must proceed in spite of such a resolution. Here, too, while the meeting still continued assembled, for there is no averment that it was dissolved, and while the subject was still under consideration, the rate was made by those who were willing to perform the duty for which they had assembled, and who were on that account

* 698 the only persons whose * acts the law can regard. It was made by the majority of those who were lawfully taking part in the proceedings of the vestry. The others must be considered to have withdrawn.

The rate is regular in substance and in form. The church is conceded to have been out of repair ; the legal duty to repair the church is admitted ; the meeting was summoned for the purpose of discharging that duty ; and the resolution which is said to be a negation of the rate is nothing but a refusal to proceed with the proper business of the meeting, which refusal is illegal and void. The persons who so refused must be considered to have absented themselves, and to have left the others to perform the legal duty which they had neglected ; the act of those others then became the act of the whole meeting.

[THE LORD CHANCELLOR. — It is not proved that the rate was voted on, — it is alleged to have been produced and signed.] The burden of establishing its invalidity lies on the other side. For any thing that appears to the contrary, it may have been signed by the whole meeting. [THE LORD CHANCELLOR. — No ; it is expressly stated that Caulfield and others protested against it.] No strict form of proceeding is necessary to make a good rate. It is not necessary to put it to the vote. It may be made without objection taken. Assume that all those who decline to make any rate had left the room, those who remained would be those willing to make the rate. No necessity would then arise to put the rate to the vote. That is the very case here ; for the defendant in error contends that those who refused to do what the law required must be considered to have gone away.

But then it is said, first, that the making of a rate is not the only mode of performing the duty which is admitted to exist.

Secondly, it is said that, assuming the making of a rate to be the only proper mode of performing the duty, still the only mode of enforcing its performance is by punishing the contumacious with excommunication or interdict ; * and it is further * 699 contended that the circumstance of calling the refusal an offence, showed that the punishment would be effective. And, thirdly, it has been contended that the vestry, being a deliberative body, did not resemble a body of electors assembled to perform a specific duty, but might exercise a discretion upon the subject as to which the vestry had been assembled to deliberate ; and as to this third point, it has been remarked that, if the rate could lawfully be made by the minority, there would have been, long before this time, many instances of its being so made.

On the last of these points, which may be first considered, the case of *Methold v. Winne*¹ has been cited ; but it does not support that proposition. No doubt, if the money wanted for the repairs of the church had been put on the table of the vestry by the persons then present, and, in like manner, if the church-wardens had sufficient money in their hands, and the inhabitants in vestry assembled authorised (as they might do) the church-wardens to apply these funds to the repair of the church, no rate could have been imposed, because none would have been required ; but that does not show that the inhabitants in vestry assembled can resolve that the repairs shall be effected by any means which they please, or left without being effected at all. That was the distinction taken by Mr. Justice Cresswell in the Court below, as to the case of *Methold v. Winne*, and it was a perfectly sound distinction. The parishioners in vestry have no authority to bind the rest of the parish to any thing but a church rate for the repairs of the church.

This duty to provide for the repairs of the church existed at common law. The statute *Circumspecte agatis*² referred to it as an old practice. That duty was an original * charge * 700 on the land, and, till that statute, might have been enforced at common law. That fact of itself justifies the proposition, that this duty being imposed upon the parish, and the vestry being convened for the purpose of discharging it, that body has no power to deliberate whether it shall be discharged or not, but only in what way the necessary funds can be best raised. Assuming the vestry

¹ 1 Roll. Abr. 393, tit. Church-wardens, A. pl. 3, c. 1.

² 13 Edw. 1, ch. 1.

to be a deliberative body, the refusal to do what the vestry was assembled to deliberate upon, namely, how best to raise money for the repair of the church, was, in fact, a refusal to deliberate. The case of the House of Commons is not in point, for the duty to raise supplies is a moral duty of imperfect obligation, not a legal duty which can be enforced by legal process. The case of a trust is one more nearly in point. It is one where a discretion exists, but not to the extent of refusing to discharge a duty. Suppose a man with an estate charged on mortgage with 10,000*l.* and suppose him to direct that that charge shall be satisfied within five years, "in such manner as my five trustees shall think fit"; or suppose that, instead of a mere charge, there was a right of redemption within a certain number of years, and he gave such a direction to his five trustees, and suppose that three of the trustees met and agreed that they would not get back the estate, the other two would have the complete legal right and power to do what was necessary to discharge the trust.

Then as to the argument that, as the parties disobeying the law might be punished for not making the rate, there was no power in others to make the rate. It does not follow that, because parties are liable to be punished for acting in a certain manner, their acts are valid: yet such must be the argument maintained on the other side. It amounts to saying, "If the parties can be punished for refusing to make a rate, their refusal is operative"; in that is the fallacy of the argument. The refusal is not operative. Suppose

*701 *parties make a riot at an election, — they may be punished for making it, but that will not stop the election; those who stay peaceably and vote will decide the election. It is not correct to say that these parties are only liable to censure for obstructing the making of the rate; they did not obstruct it, they tried to do so, but their acts were inefficient for that purpose. If nothing was done to occasion damage, there could be no punishment. That was the case in *Cooper v. Wickham*,¹ where there was nothing to show that the church was out of repair; there was, therefore, no duty required to be performed. The averment there was defective, and the case turned on that point. Here the fact of want of repairs is distinctly averred. In *Francis v. Steward*,² the insufficiency of the averment was likewise the ground on which the Court proceeded. These cases merely show that, in a

¹ 2 Curteis, 303.

² 5 Q. B. 984, 3 Curteis, 209.

criminal form of proceeding, the minute particulars necessary to make out the offence must be distinctly averred. They are therefore inapplicable here. Then comes the question whether the course of proceeding here, whatever may be the consequence to the parties who moved what is called the amendment, was not such as to make a valid rate. For such a purpose, was the vestry a purely deliberative body, or was it like an elective body? It cannot be said to be a purely deliberative body, for it has a fixed legal duty to perform. Admitting, on the high authority of the recent decision in this case, that it is not in the power of the churchwardens of themselves, as churchwardens, to make a rate, still it was open to the defendant in error to contend that, if the churchwardens were present in a vestry assembled, as this had been, to discharge an imperative legal duty, and if the other parishioners refused the rate, the churchwardens, being *parishioners then present in vestry, might make it. If so made, it would be lawfully made. In all the cases, the Courts assume every thing in favour of the rate, because the making of it is a legal duty. Thus, in *Wayte v. German*,¹ Lord Chief Justice North treated the allegation that "the parish, or some of them, did rightfully make the tax," as showing that the rate was well made, and so prohibition was refused. The case of *Rogers v. Davenant* was cited by the other side from 1 Modern,² but it was again reported in the succeeding volume.³ There the question was whether the Bishop's Commissioners might impose the rate, and the Court was unanimous that they could not, but added, that "the churchwardens, by consent of the parish, are to settle the sums to be paid"; and said that "there may be a libel to pay the rates set by the churchwardens." The opinion there expressed is adopted by Degge,⁴ who expressly says that, "if the parishioners refuse or neglect to make the assessment, or refuse to meet, I conceive the churchwardens, having just cause for such assessment, may proceed alone"; and throughout the authorities there is nothing overruling the dictum in *Thursfield v. Jones*;⁵ and that that dictum was acquiesced in as expressing the law, is proved by the fact that, since then, the practice of the opponents of rates has been, not to refuse a rate altogether, but to

¹ 2 Show. 141.² 2 Mod. 8.³ 1 Mod. 194.⁴ Parson's Counsellor, part i. c. xii. p. 165.⁵ 1 Ventr. 367; the case is called in the first edition Anonymous.

vote one which was too small for the purpose required. That practice itself shows that the vestry has not been considered, when assembled to make a church rate, a purely deliberative body, having the right to refuse the rate altogether, but a body bound to discharge the duty, and incapable, except by a trick and an evasion, to escape from its performance.

* 703 * It is said that the judgment of the Court below is a judgment that the minority may tax the majority. If so, it could not be supported. But the proposition, so put, is a fallacy: for, first, this was not a meeting to impose a tax; and secondly, the parties who came to the resolution to make the rate were not the minority. It cannot be said that a resolution to continue a payment which has been made for a thousand years was a resolution to impose a tax; no one ever speaks of the Commissioners of the Land Tax imposing a tax. The law has imposed the tax; the Commissioners merely settle how the legal liability shall be discharged. Nor can it be said that the Court of Chancery imposes a tax on the suitor when it makes an order for the distribution of the assets of an estate.

Then as to this being the act of the minority, it is clear that, in many instances, the act of the minority would be valid. It is admitted to be the duty of the vestry to provide for the repair of the church, and that being so, the Court of Queen's Bench will grant a mandamus to compel performance of that duty. *The King v. Wix.*¹ There the mandamus was to meet and elect church-wardens.

[THE LORD CHANCELLOR.—To whom could the Court direct such a mandamus?]

It appears there to have been directed to the parishioners liable to contribute to the church rate, and that was done after the Court had looked into precedents. Suppose the inhabitants assembled under the orders of the mandamus; and suppose some of them to elect persons who were not parishioners, but the others to elect parishioners; though the former might be elected by the majority and the latter by the minority, the latter election would alone be good. In *Oldknow v. Wainwright*,² twenty-one persons met to elect a town clerk; nine voted for a particular candidate, * 704 * eleven protested against him, but did not record their votes, one neither protested nor voted. The Court held

¹ 2 B. & Ad. 197.

² 1 W. Bl. 229, 2 Burr. 1017.

that the election by the nine votes was valid, for that where the majority did nothing but declare a dissenting opinion, it must be taken that no votes had been given. These cases are decisive of the principle. Then how is the effect of them got rid of? By insisting on a supposed distinction between cases of elective, or ministerial, and of deliberative bodies. But there is no such distinction; there can be no difference between voting for an unqualified candidate or for an unlawful proposition. The *Eynsham Case* (12 Q. B. 398, note), cited in the Court below, is not an authority the other way, for there the proceedings were under the special terms of a local Act, but here the matter is regulated by the common law.

[LORD BROUGHAM.— Suppose a 2s. rate, and then a 1s. rate, were proposed and put to the vote in succession, and a man voted against each, would not the sum and substance of his vote be equal to saying that there should be no rate at all?] No; the law always presumes that a man will act legally. In each case the assumption would be that he voted against the sum proposed because he thought it too high. [LORD BROUGHAM.— Then your argument is, that if he said he voted against the 2s. rate because he thought there ought to be no rate at all, his vote, given for such a reason, would be no vote at all, — it would be lost?] No; the vote might be good, though the reason for it was bad. But if he stated that he came to the vestry for the express purpose of saying that he would not grant any rate at all, he would in effect declare his intention not to take any part in the proceedings of the meeting, and he must be accounted absent from it. [LORD BROUGHAM.— Suppose he said he would not vote for any rate, and then, on the proposition of a 2s. rate, he voted against it?] He would then be simply exercising his power to give a vote against that particular *rate. [LORD BROUGHAM.— *705 Then he might validly take part in the proceedings, though he gave a bad reason for his vote. Would not his general negative apply to each separate vote?] That question assumes that he has power to give a general negative, but he has no such power. He may step by step refuse any rate, — that would be legal. But here the resolution was inapt to the business of the meeting, and was, therefore, wholly illegal and void. [LORD BROUGHAM.— Might he propose a rate of a farthing in every hundred pounds?] The law would say that such a proposition was illusory.

Then as to the form of the averment in the declaration. The ordinary form is here followed ; it is that the rate was made by "the church-wardens and others." It is not necessary that a proposal for a rate should be put from the chair.

[THE LORD CHANCELLOR. — But here it was put from the chair in the first instance, for an amendment was moved to it.]

Then it lies on the other side to show that the majority did not concur in making the rate. It was not necessary to put the question to the vote, if all who were resolved to negative any rate could be taken to be absent, for then the vestry would be unanimous. It is said on the other side, that it cannot be known from the record who made the rate ; then, if so, it must be assumed to have been made by the majority, and there is no averment by the plaintiff in error that that is not the case.

What then is the result of the authorities ? They show that the Bishop and his Commissioners cannot make a rate, nor can the Archdeacon, nor the Ecclesiastical Court, nor can the church-wardens, after the vestry has separated ; but there is no case which shows that a rate made under the circumstances under which this

rate was made is invalid. *Thursfield v. Jones*¹ shows that * 706 it can be so made ; and * in one² of the many reports of

Pierce v. Prouse, which is reported in several places and under several names,³ Lord Holt expressly says that, "if there be public notice given to the parishioners, and they will not come, the church-wardens may make a rate without them." Degge's authority is to the same effect ; and in *Gaudern v. Silby*,⁴ the very thing which has now been done was declared valid and effectual. These authorities are confirmed by Johnson's Clergyman's Vade-Mecum,⁵ Watson's Complete Incumbent,⁶ Wood's Institutes,⁷ and Bacon's Abridgment,⁸ all of which show what has been the general impression among writers on these subjects. The course which has now been pursued is not, therefore, novel or without authority ; it is in accordance with a settled principle of law, and is the only course by which a legal duty can be effectually enforced.

¹ 1 Ventr. 367.

² Anonymous, Comb. 344.

³ *Pense v. Prouse*, 1 Ld. Raym. 59 ; *Pierce v. Prouse*, 1 Salk. 165 ; *Hawkins v. Rouse*, Holt, 139 ; *Hawkins v. Rouse*, Carth. 360 ; Anonymous, Comb. 344 ; *Hawkin's Case*, 5 Mod. 389 ; *Price v. Rouse*, 12 Mod. 83.

⁴ 3 Curteis, 272 ; Johnson's Braintree Case, 103.

⁵ Page 17.

⁶ Pages 88 – 90.

⁷ Page 389.

⁸ Church-warden, C.

Mr. Mellor, in reply.—The allegation on the record, by the defendant in prohibition, as to the mode in which the rate was made, is insufficient and bad. There is no allegation whatever that the resolution for making it was put to the meeting. On the other hand, it is clearly shown that the amendment to refuse to make a rate was put to the meeting, and was carried by a large majority. Nor is it shown that the pretended rate was agreed to by the majority even of those who were willing to make a rate. A form of rate was * produced to some persons present, and they agreed to it, but it was never adopted by the meeting. The case of *White v. Beard*¹ shows that a resolution of the vestry is all that gives validity to a rate. The Exchequer Chamber in this case assumed that such a resolution had been made. No such assumption can be made: *The Queen v. Thomas*,² where a mandamus to compel the officers of a parish to raise a rate made by the minority and the church-wardens, after the majority had voted against it, was refused by this Court. The suggestion thrown out in the Exchequer Chamber, when *Veley v. Burder*³ was under consideration, is no authority for what has been done here. On the contrary, it was said in *The Queen v. Thomas*, referring to that very suggestion:⁴ “The Lord Chief Justice, in the sentence quoted, raised an entirely novel point, in which he studiously avoided committing himself or any of his brethren. The distinction between the imaginary case and the actual case then calling for judgment was hardly known; no argument or remark had been founded on it, either in this Court or the Court of Error.” A monition has no effect in circumscribing the powers of the vestry; if it had, it would be a mere usurpation of those powers by the Ecclesiastical Court. Suppose that, under a monition, the inhabitants were summoned to see themselves taxed; it is plain that such a monition would be absurd, yet the argument here would give exactly that effect to the monition issued in this case.

The case of *Gaudern v. Silby*⁵ must be considered to have been distinctly overruled by the authority of the Judges in the case of *Veley v. Burder*,⁶ in the Exchequer Chamber. There are then

¹ 2 Curteis, 480, 485.

² 12 A. & E. 308.

³ 3 Q. B. 589.

⁴ 3 Q. B. 597.

⁵ 3 Curteis, 272; Johnson's Braintree Case, 103.

⁶ 12 A. & E. 233.

* 708 only remaining the cases of * *Thursfield v. Jones*,¹ which has already been disposed of, so that it will never be cited again as authority for such a purpose, and *Rogers v. Davenant*,² which does not support the proposition for which it was cited, but shows that the church-wardens can only make a valid rate by the consent of the parish. Those cases being removed, the dictum to be found in Degge's Parson's Counsellor is absolutely valueless.

The analogy attempted to be established between the proceedings of the vestry and of electors at a parliamentary election entirely fails. It is conclusively the duty of the electors to elect some one; it is not conclusively the duty of the vestry to agree to a rate proposed by the church-wardens. And as to votes being thrown away, when given to an unqualified candidate, all the writers on election law agree that the disqualification, to produce such a result, must be known and notorious. The illegality of this amendment was not known,— it is not known even now; it is believed to be a perfectly legal amendment, and as such it was put to the meeting at the time by the chairman.

The church-warden is not liable to punishment, if he does his best to get the church repaired. *Cooper v. Wickham*,³ Archdeacon Hall's Precedents.⁴ It is clear that, to allow a minority in the vestry to do an act binding on the whole parish, which the majority in the vestry has distinctly refused to permit, would be against the principles of our law, and there is no authority which shows that, in this particular instance, an exception is to be made to those principles.

THE LORD CHANCELLOR.— My Lords, from the course of the arguments which have been addressed to the House in this
 * 709 case, with great ability, * your Lordships will perceive that the question is one of great public interest, and applies to the whole country, as to the manner in which the making of church rates, for the purpose of repairing the church, may be enforced, and the benefit of them secured to the establishment for the maintenance of the fabric in which the services of religion are to be performed; but various questions have been raised as to the particular course which is to be pursued. It is not now denied

¹ 1 Ventr. 367.

² 2 Mod. 8.

³ 2 Curteis, 303.

⁴ Page 14.

that it is clearly the common-law duty of the parishioners of every parish to repair the parish church. Whatever doubts have been expressed, and some seem to have been entertained upon that subject, I believe the opinion is now universal (I presume it is so amongst those who are well informed upon the subject), that it is a duty as imperative as any common-law or statute duty which exists. The difficulty has been as to the mode of enforcing the performance of that duty where the parishioners have been divided in opinion.

Upon the present occasion it appears that a rate has been made, or professed to be made, under the circumstances disclosed in this record, and the matter comes before your Lordships in a shape which has given rise to three questions. First of all, we have heard it argued that the rate, as stated upon the face of the record, appears to be an invalid rate. Next, it is said that, supposing it does not appear in point of form to be invalid, sufficient circumstances are not shown to manifest that it is a valid rate, and that those who call upon the Court to enforce the rate ought to show that the rate so sought to be enforced was legally made. That proposition is denied by the defendant in error, who contends that it is enough if, upon the face of the record, the invalidity or illegality of that rate does not appear; that if the record, upon the whole, discloses circumstances quite consistent with the rate being a valid rate, though all the circumstances which would be necessary in *order to sustain it do not appear, *710 yet it is not open to the party in the stage in which this proceeding of prohibition occurred to take any such objection; and it is insisted before your Lordships, that upon the face of this record no valid objection appears to arise, and that all has been done which is necessary to repel the proceeding in prohibition.

My Lords, on a question which has occasioned so much agitation in different parts of the country, and which is one of so much importance as I have stated, I am sure your Lordships would wish to have all the assistance which the learned Judges can afford to you before coming to a determination upon it. I therefore beg to propose to your Lordships, that certain questions shall be put to the learned Judges, those questions being such as appear to me to be calculated to produce answers from the learned Judges which will be available to your Lordships in the further consideration of this case. My Lords, I propose, first, for the purpose of meeting

the argument that the rate is invalid, to ask the learned Judges whether, upon the face of this record, they are of opinion, affirmatively, that the rate is invalid. If their opinion should be that it does so appear, then I apprehend no further question would require to be answered ; because, of course, the Court below ought to be prohibited from enforcing an invalid rate.

The rate may not appear to be invalid, there may be sufficient circumstances apparent to be consistent with its being valid. But on the other side it is argued, that it is not enough, in order to entitle the Court below to enforce the rate, that it does not appear to be invalid. I therefore beg to suggest to your Lordships, as a question that will elicit an answer from the learned Judges which may be necessary in one view of the case, to ask, secondly, whether, upon the face of this record, the rate appears to be a valid rate.

* 711 * Supposing the learned Judges should be of opinion that this does not appear to be a valid rate, and that neither does it appear to be an invalid rate, the third question is addressed to the object of ascertaining whether, under such circumstances, it is a rate which the Court below ought to enforce. It is objected that the writ of prohibition in this case was moved for in a stage of the proceedings in which the party is only entitled to that relief, provided that upon the face of the record the rate is invalid. With the view, therefore, of raising that third point, that if the rate neither distinctly appears to be invalid nor to be valid, but that the circumstances are consistent with its being a valid rate, and that it is not open to the party to object to the absence of some allegations which are in his view necessary to sustain a valid rate, I propose to ask the learned Judges, Does a prohibition lie against the enforcement of the rate set forth on the record under the circumstances apparent upon the record, that is to say, looking to the period and the stage of the proceedings at which the prohibition was sought ?

My Lords, it appears to me that the answers to these questions — first of all, is the rate clearly invalid ; secondly, does it appear to be valid ; and thirdly, does a prohibition lie under the circumstances disclosed upon the record — will obtain for your Lordships all the information which is necessary in order to arrive at a satisfactory decision upon the case. I therefore beg leave to propose that these questions be addressed to the learned Judges.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend as to the questions to be put to the learned Judges, which, as it seems to me, will sufficiently exhaust the case.

My Lords, I cannot close the simple observation which I think it necessary to make in support of my noble and learned friend's motion without adding, that though I am * 712 perfectly satisfied, as your Lordships ought to be, and I am sure will be, with the able assistance of the learned Judges, who have now during two days been present at the hearing of this case, I hope and trust we may be enabled, in consequence of what passed last session, and the late creation as a privy councillor of my most learned and most dear friend Sir John Patteson, to have at some future time the inestimable benefit of his assistance in similar cases ; for I will venture to say, that a more learned, a more able, a more honourable, and a more amiable person never adorned the bench.

LORD CAMPBELL expressed his concurrence with the questions now proposed.

The following questions were then put to the Judges : —

1. Does the present record show the rate sought to be enforced to be an invalid rate ?
2. Does such rate appear to be a valid rate ?
3. Does prohibition lie against the enforcement of the said rate in the circumstances apparent upon the record ?

The Judges requested time to consider these questions.

Ordered accordingly.

July 25.

MR. JUSTICE CROMPTON, after stating the facts of the case, said : In order to answer the first question, it is necessary to consider under what circumstances, in what manner, and by whom this rate appears on the face of the proceedings in the Ecclesiastical Court to have been made ; and then to consider the law as applicable to a rate so made.

I find from the proceedings in the Ecclesiastical Court, as set out on this record, that on the 15th July, 1841, a vestry meeting of the parish of Braintree was duly held, * in con- * 713 sequence of a monition issuing from a Court of competent

jurisdiction, and requiring the church-wardens and parishioners, amongst other things, to make a rate for the repair of the parish church, which was out of repair. At that meeting a survey and estimate were produced, and not objected to, and a motion for a rate of 2s. in the pound was duly made and seconded. The motion was met by the amendment which has been so often read in the course of these proceedings, and which was carried by a great majority of the parishioners. The effect of this amendment is, that the vestry by a great majority refused to make the rate proposed, or any other rate, assigning for so doing reasons utterly destitute of any legal foundation, and acting contumaciously and in disregard of the legal obligation by which they were bound, and of the monition of a Court of competent jurisdiction.

The record proceeds to show that, whilst "the said parishioners still continued in vestry assembled," the question was put, whether any other amendment was proposed or any other proposition made as to the amount of rate; but that no such proposition or motion for discharging the obligation upon the parish was made, and that the majority having so refused, "the church-wardens and others of the parishioners then and there present in vestry, at the said meeting of the said parish, and whilst the parishioners so continued as aforesaid in vestry assembled, did rate and tax, and that the rate in question was then and there produced, made, and signed by the church-wardens and others of the rate payers and parishioners then and there present." The rate, therefore, appears to have been made whilst the vestry meeting continued, and whilst the refusing majority continued to constitute a part of that meeting; for it is distinctly stated to have

been made whilst the said parishioners, that is, the whole *714 of the meeting, continued so in vestry assembled; * and

the rate was made by the minority, as and claiming to act as the minority, and treating the majority as no longer a part of the meeting; and not asking for, but in effect repudiating, the concurrence of the majority. If there were any doubts as to this, it is still more clear from the minutes, which are made part of the libel, and which show that, after the refusal by the majority, Mr. Veley, the defendant, addressed himself to those rate payers who were willing to obey the monition, that is, to the minority, and proposed that a rate of 2s. in the pound should be made by them; and on that the mover of the amendment protested, on his own

behalf and on the behalf of the meeting, against the irregularity and impropriety of the church-wardens attempting to make a rate after it had been refused by a large majority of the meeting ; and protested also against the rate so attempted to be made. The rate is then set out, purporting to be made at a vestry by the church-wardens and other parishioners whose names are thereto subscribed.

It was argued by the counsel for the respondents at your Lordships' bar, that these facts show that the majority retired from the discussion, and separated themselves from the meeting ; that they said in effect : " We have conscientious scruples in the matter of church rates, and cannot interfere in this discussion, and we leave it to you, the minority, to proceed and tax the parish if you choose." If they had so withdrawn themselves, no doubt the remaining minority would have constituted the vestry, would have represented the parish, and might have bound them by any rate they might have chosen to lay. But I come to the very contrary conclusion as to the result of the facts, and it appears to me that the majority remained in point of fact part of the meeting, refusing to make any rate, and struggling to the last against it, and that the minority did not affect to be making a rate assented to by the majority * in point * 715 of fact ; but that they made the rate as the minority, and without proposing it to the general meeting, on the ground that the majority had forfeited their right to interfere by their declaration, and had in effect thrown away their right of voting. They claimed to make a rate, to raise the question suggested by the Court of Exchequer Chamber in the case of *Veley v. Burder*, and which I think they have raised by the course which they took. The real question, therefore, will be that which it was the object of these proceedings to raise, whether, when the majority of a vestry meeting has, on illegal grounds, contumaciously refused to make a rate for the necessary repair of the parish church, and which the vestrymen were required to make by the monition of an Ecclesiastical Court of competent jurisdiction, the church-wardens and minority can treat such majority as absent in point of law, and as giving no vote or opinion on the matter, although they were present in point of fact, resisting and struggling against the rate ; and whether a rate so made, by such minority, without having or asking for the concurrence of the

majority, is valid. It has been agreed on all hands in the course of the arguments and judgments in this case, and it is too well settled to admit of doubt or discussion, that the parishioners are liable to the repair of the body of the parish church. This liability is thrown upon them by the law and custom of England, differing in this respect from that of most Christian countries. It is equally clear, that whilst the parishioners are liable to repair the body of the parish church, any rate for such repairs can be imposed only by the majority of the parishioners in vestry assembled. This right of the parishioners to be rated only by a majority of themselves in vestry assembled has been asserted and recognised again

*716 and again, and does not, after the investigation and discussions which have taken place on this subject, admit of *any doubt. Whether the laying a rate is to be considered as taxing, or, as suggested at the bar, as only distributing a legal burthen, it is clear in point of law that a church rate can only be made by the majority of the parishioners in vestry assembled; and they are to proceed by making what has been called a by-law or ordinance, for which purpose they are said to be in the nature of a corporation. Any attempt by the Spiritual Courts or by any other parties than the majority of the vestry to impose a rate seems always to have been resisted with great jealousy; and it must now be assumed that neither the Ecclesiastical Court, nor the ordinary nor special commissioners, nor the church-wardens, as such, can impose a church rate, even when the vestry meeting has contumaciously refused to make one. It is clear, on the other hand, both on the authorities and from recent discussions, that the majority of those who choose to attend may bind the whole parish, and that the church-wardens alone, if parishioners, in the event of no other parishioners attending a duly convened meeting, may themselves, as parishioners, constitute the vestry, and bind the parish. It must also be assumed that any parishioners attending the meeting, and refusing to take any part in the proceedings, may be treated as absent, or as not constituting part of the meeting for the purposes as to which they decline to interfere; and the proposition that the rate must be made by the majority has been properly qualified by being confined to the majority of those attending and taking part in the proceedings.

The question, therefore, comes to the narrow and simple point, whether the minority who laid the rate can, under the circumstan-

ces, be treated as the majority of the parishioners in vestry assembled who took part in the proceedings? Can it be properly averred that the rate in question was made by the majority of the parishioners *in vestry assembled, meaning by that *717 phrase the majority of those who took part in the proceedings? In point of fact the majority of the parishioners in the vestry remained present, dissenting from the rate in question or any other rate, and the alleged rate was made by the minority, without uselessly putting the question to those who had declared and continued to declare against any rate; and the rate was laid by that minority claiming to constitute the meeting; and it is to be considered, whether the defendants have made out, either by direct authority or from analogy, that the misconduct of the majority had worked a forfeiture of their right to interfere, and had given the minority who wished to do their duty a right to consider themselves as constituting the meeting, to the exclusion of the contumacious majority, and that, to use the expression of the Court of Queen's Bench, at the end of the judgment, "the amendment was in effect a withdrawal of the majority from the meeting."

The defendants in error attempt to support the right of the minority to make a rate under circumstances like the present; first, on the ground of the authorities in the cases of church rates, which have been so fully discussed in the arguments and in the judgments in the Courts below; and, secondly, and mainly, on the ground suggested by the Court of Exchequer Chamber, in *Veley v. Burder*, of the analogy between cases like the present and those of the election of corporate officers, when electors voting for an ineligible party with notice, or protesting and not voting at all, are held to have thrown away their votes. None of the authorities in the cases as to church rates appears to me to bear distinctly upon the present question. They are very carefully examined, and put as strongly as they can be in favour of the defendant's case, in the judgment of Mr. Justice Cresswell in the Exchequer Chamber. They seem to *me, however, either to have *718 proceeded on the ground that the church-wardens, as parishioners, might have constituted the meeting, "if none other of the parish would come together," or else to have proceeded on the ground, which must now be considered as bad law, that the church-wardens, perhaps, as being more directly liable to ecclesi-

astical proceedings, have the power to make the rate on the refusal of the parishioners. In none of these authorities is the question raised as to the minority having a right to treat the contumacious majority as having withdrawn from the meeting. In truth that question was first suggested in the Court of Exchequer Chamber in *Veley v. Burder*. The reasoning of the Court of Queen's Bench, in the judgment in *Veley v. Burder*, is very strong to show that no such doctrine as that now contended for can be supposed to have prevailed in the earlier cases. It seems impossible to suppose that the illegal and unconstitutional courses alluded to in that judgment could have been adopted, if, on the refusal of the majority, the church-wardens or any individual parishioners could have made the rate at the meeting, on the ground of the rest having virtually withdrawn. The reasoning of the Court of Queen's Bench on this point will be found equally applicable to the present case as to that of *Veley v. Burder*, where the question was as to the right of the church-wardens to make the rate after the vestry meeting. The punishment of the majority for having obstructed the making of the rate, referred to by Mr. Baron Rolfe in his judgment, tends also to negative the supposition that it could have been considered as law in earlier times that the rate could be well made by a minority of the vestry who were willing to do their duty. It appears to me, therefore, that there is not only an entire absence of any distinct authority on this question in the cases referred to, but that there are strong re-

* 719 sons for disbelieving that such * doctrine has ever been acted upon or discussed, and the question must be considered as a new one. I think, therefore, that, in the absence of any distinct authority on the question, and considering the strong reasons for disbelieving that such doctrine has ever been recognised or acted upon, no reliance can safely be placed on this branch of the arguments for the defendants.

It remains to consider the question suggested by the Court of Exchequer Chamber in *Veley v. Burder*, to raise which the present course of proceedings appears to have been adopted, and which I concur with the judgments below in thinking really and fairly arises on this record. This question is, whether the rule of law referred to by the Exchequer Chamber as to corporate and other electors is applicable to the present case, and makes out the right of the minority to treat the majority as absent or as having with-

drawn, or as having forfeited their right to interfere in the subject matter before the vestry. It is principally on the ground of the supposed analogy between this rule of law and the law as applicable to the present case, that the majority of the vestry is treated by the judgment of the Court of Queen's Bench as having virtually withdrawn from the vestry, and by the judgments in the Exchequer Chamber as being absent in spirit and point of law, though present in body, and as having thrown away their votes and forfeited their right of voting. The authority most relied upon for the defendants as to this part of their case is *Oldknow v. Wainwright*,¹ in which case it was held that an election by the minority was good, when the majority dissented from the election, but voted for nobody else. Lord Mansfield in his judgment expressly relies on the fact of the majority not voting at all. It is not said, * or hinted at, that the majority had lost the right * 720 of voting by their illegal protest, or that they were to be punished for their misconduct by the loss of their votes, or that they ceased to form part of the meeting. On the contrary, their right to interfere in the election by the whole body is recognised ; they are treated as continuing present as part of the meeting, but, as they did not take the only means of opposing the election of the party, which the Court declared was by voting for somebody else, or at least against the candidate, the votes really given constituted a majority for him. This case is far from establishing such a doctrine as that now contended for, that the minority in such cases may treat the majority, remaining present and continuing their dissent, as either absent or assenting.

These cases of corporate and other elections, the result of which depends on the relative majority of votes, and where the minority have either not voted, or have thrown away their votes by voting for an ineligible person, appear to me to furnish no analogy to a case where the act in question is to be done by the majority of the meeting, and where the majority, however illegally, refuse their assent, and dissent from the proposed act. It is the not voting for some eligible candidate, who might have the majority, and so exclude the other candidate, which has, in elections conducted in the ordinary way, the same effect as a forfeiture of the right to vote, or the acquiescence in the election of the other candidate. But when the election is not by voting for one candidate as against

¹ 2 Burr. 1017.

another, but a majority of the whole meeting is required for the election, no such result occurs, even in cases of election. Thus, in the case put by Lord Cranworth, of the election of the Speaker of the House of Commons, if the whole House, except one member, were to vote that they would do better without a Speaker, it would be absurd to say that the one member who was prepared to

*721 * do his duty would have a right to consider himself as the

House, to vote the rest absent, or treat them as having forfeited their right to interfere, and proceed to name the Speaker himself. It would be difficult, however, to mention a case where there would be a more strict duty to perform, or where the proceedings would be more contumacious, if, as supposed in the judgments in the Court below, the duty being an imperative one, or the contumacious nature of the misconduct, can affect the question. By the 92d section of the Municipal Corporations Act, the town councils, in case of the borough fund not being sufficient, are authorised and required to lay a borough rate. Here there is a duty directly and expressly enjoined by Act of Parliament. Suppose that a majority of the town council should contumaciously refuse to lay any rate, admitting expressly that there is no other mode of raising the funds required for the purposes in the Act. Can it be said that a good borough rate could be laid by the minority, and that the 69th section, which directs that the majority shall decide, is to be repealed? The more correct rule was laid down in the case of *The Rate Payers of Eynsham*,¹ with which I entirely concur, and which cannot, I think, be distinguished from the present case on the ground relied upon, of the majority being in one case required by the common law and in the other by statute. In either case an addition, for which I find no authority, is to be made to the common law or the statute, by the introduction of the qualification that, if the majority should refuse altogether to perform the duty, the minority may do it; and whether the majority is required for the validity of the Act by a statute or by the common law, can in my opinion make no difference in this respect. I believe the real doctrine to

*722 be, that the majority so refusing * to perform the duty is to be punished, but that it cannot be legally held that the act is well done by the minority. I would ask what breach of duty, or what decree of contumaciousness, is to have the effect in

¹ 12 Q. B. 398, note.

question? Suppose that the majority should declare, before and at the vestry, that they will oppose any rate, and act on such declaration by negativing every vote as it is proposed, is an inquiry to be made whether the conduct of the majority was contumacious, so as to give the right of proceeding to the minority? It appears to me to be a much sounder and wiser course to adhere to the plain rule of the statute or common law, requiring a majority for the validity of the act, than to introduce questions which may make the validity of the rate depend on an inquiry into the conduct of parties. It was much relied on in the judgments below, that the minority could not be compelled, by the breach of duty of the majority, to abstain from doing their duty; but, with great deference and respect to the learned Judges who took this view of the case, it seems to me rather a popular and rhetorical topic than a sound argument, to show that the minority could do the act required to be done by the majority. It assumes that the minority are prevented from doing the acts which it is their duty to do, by the illegal act of the majority, whereas it is the duty of the whole body, and not of the minority, to do the act. The minority are not prevented from performing any duty cast upon them, the minority; they do what they can, and are guilty of no breach of duty. The argument might be applied to every case of commissioners, arbitrators, courts, or other bodies, where the statute or common law, or the agreement of parties, renders the concurrence of the whole body or of a majority necessary. No authority has, however, been cited, and I believe that none exists, to show that in any such case as I have alluded to, the minority can

* assume the power of acting, by reason of the contumacious refusal to act of the rest of the body. Suppose that a statute required a Court, consisting of four Judges, or required a majority of a body of four commissioners, to do a particular act, and that three of them refused, either from misapprehension of the law, or contumaciously, and intending to disregard the law, can it be contended that the one Judge or commissioner, who wished to do his duty, could act alone, so as to make the proceedings valid by reason of the dissent of the others? Yet in all these cases it might be asked, just as in the present case, how can the Judge or commissioner, who is ready to do his duty, be prevented from doing it by the wrongful act of his fellows?

I think, therefore, that in the present case, the right of the

contumacious majority to interfere was not lost by their misconduct; but that they were entitled to vote for or against any rate which might be proposed, and they either were taken at the meeting to have so voted against each and every rate, as to make it unnecessary to put the particular rate again to them, or else the proceedings were faulty in the rate not being put to the meeting. In neither case does the rate seem to me to have been imposed by the majority. I agree that no very formal mode of putting the vote was necessary, but I think it was not put to the majority because they had dissented from any rate that could be brought forward, and the minority then appear to me to have laid a rate themselves, without having or asking for the vote of the majority who protested against it.

I think that such rate cannot, by any fiction of law, be deemed to be, what it is not in truth and in plain common sense, the rate of the majority of parishioners in vestry assembled. I therefore answer your Lordships' questions by saying that, in my opinion,

the rate appears on this record to be invalid, that it does
*724 not appear to be valid, and *that prohibition lies against
the enforcement of the rate in the circumstances apparent
upon this record.

MR. BARON MARTIN.—The questions which your Lordships require to be answered by the Judges arise upon a demurrer to a declaration in prohibition. The declaration is very long, but the substantial question which has been argued at the bar of your Lordships' House is, whether a church rate of 2s. in the pound, made on the 15th of July, 1841, in the manner stated on this record, at a vestry meeting of the parish of Braintree, in Essex, was a valid rate.

The facts alleged in the declaration, and upon which the validity of the rate depends, are these (the learned Judge stated them very fully, and proceeded thus): The question is whether this was a lawful rate. In the course of the argument, it was alleged that the vote of the majority was not against the rate at all, but was a mere affirmation of certain abstract opinions, and that the minority alone voted in respect of the rate. This is a question as to the true meaning of what is stated on the record to have taken place at the vestry. And to me it is clear that there was a direct vote of the majority not to make the rate. The amendment con-

cludes with the allegation that the vestry refused to make a rate; and upon the amendment being carried, one of the churchwardens proposed to the rate payers who were willing to obey the monition (or, in other words, to make a rate), that a rate should be made by them, and the rate was then produced, and was signed by the vicar, the churchwardens, and several of the rate payers. The substance of the transaction, therefore, was, that the majority refused to make the rate, and the minority made it; and the protest at the conclusion of the proceedings against the rate satisfactorily proves that this was what was meant and understood * by the vestry,— and I think it raises the substantial question in controversy between the parties, viz. * 725

Assuming a church to be out of repair, and a vestry of the parishioners legally called together and assembled for the purpose of providing for the repairs, can the churchwardens and a minority of the vestry impose a legal church rate upon the parish, in opposition to the votes of the majority? In my opinion, this also disposes of the second point made on behalf of the plaintiffs in error, viz. that it does not appear that the minority made the rate. I think it does sufficiently so appear.

Before proceeding to the consideration of the main question, there are some preliminary matters which are necessary to be ascertained. 1st. Did the monition from the Ecclesiastical Court, of itself, create any additional obligation upon the parishioners to make the rate? No authority was cited to show that it did. And it appears to me that its real operation was the more satisfactorily to establish the necessity for the repairs, and the more directly to bring the parishioners under the cognizance of the Ecclesiastical Court. In my opinion, the legal obligation of the parishioner remained the same as before, neither greater or less. 2dly. What is the legal obligation of the parish? And I have no doubt that it is "to keep the church in repair." It is, as stated by Chief Justice North, in *Rogers v. Davenant*,¹ and in Ayliffe's Parergon,² analogous to the liability to repair a bridge or a highway; and should it become necessary to aver in pleading the legal liability of the parish, it would, in my opinion, of necessity be alleged as the duty to repair the church, and not to make a rate, in like manner as the legal duty of a parish must be averred to be to repair the highway, not to make a rate for the

¹ 1 Mod. 194.

² Page 452.

contumacious majority to interfere was not lost by their misconduct; but that they were entitled to vote for or against any rate which might be proposed, and they either were taken at the meeting to have so voted against each and every rate, as to make it unnecessary to put the particular rate again to them, or else the proceedings were faulty in the rate not being put to the meeting. In neither case does the rate seem to me to have been imposed by the majority. I agree that no very formal mode of putting the vote was necessary, but I think it was not put to the majority because they had dissented from any rate that could be brought forward, and the minority then appear to me to have laid a rate themselves, without having or asking for the vote of the majority who protested against it.

I think that such rate cannot, by any fiction of law, be deemed to be, what it is not in truth and in plain common sense, the rate of the majority of parishioners in vestry assembled. I therefore answer your Lordships' questions by saying that, in my opinion,

the rate appears on this record to be invalid, that it does
*724 not appear to be valid, and *that prohibition lies against
the enforcement of the rate in the circumstances apparent
upon this record.

MR. BARON MARTIN.—The questions which your Lordships require to be answered by the Judges arise upon a demurrer to a declaration in prohibition. The declaration is very long, but the substantial question which has been argued at the bar of your Lordships' House is, whether a church rate of 2s. in the pound, made on the 15th of July, 1841, in the manner stated on this record, at a vestry meeting of the parish of Braintree, in Essex, was a valid rate.

The facts alleged in the declaration, and upon which the validity of the rate depends, are these (the learned Judge stated them very fully, and proceeded thus): The question is whether this was a lawful rate. In the course of the argument, it was alleged that the vote of the majority was not against the rate at all, but was a mere affirmation of certain abstract opinions, and that the minority alone voted in respect of the rate. This is a question as to the true meaning of what is stated on the record to have taken place at the vestry. And to me it is clear that there was a direct vote of the majority not to make the rate. The amendment con-

cludes with the allegation that the vestry refused to make a rate; and upon the amendment being carried, one of the churchwardens proposed to the rate payers who were willing to obey the monition (or, in other words, to make a rate), that a rate should be made by them, and the rate was then produced, and was signed by the vicar, the churchwardens, and several of the rate payers. The substance of the transaction, therefore, was, that the majority refused to make the rate, and the minority made it; and the protest at the conclusion of the proceedings against the rate satisfactorily proves that this was what was meant and understood * by the vestry,— and I think it raises the substantial question in controversy between the parties, viz. Assuming a church to be out of repair, and a vestry of the parishioners legally called together and assembled for the purpose of providing for the repairs, can the churchwardens and a minority of the vestry impose a legal church rate upon the parish, in opposition to the votes of the majority? In my opinion, this also disposes of the second point made on behalf of the plaintiffs in error, viz. that it does not appear that the minority made the rate. I think it does sufficiently so appear.

Before proceeding to the consideration of the main question, there are some preliminary matters which are necessary to be ascertained. 1st. Did the monition from the Ecclesiastical Court, of itself, create any additional obligation upon the parishioners to make the rate? No authority was cited to show that it did. And it appears to me that its real operation was the more satisfactorily to establish the necessity for the repairs, and the more directly to bring the parishioners under the cognizance of the Ecclesiastical Court. In my opinion, the legal obligation of the parishioner remained the same as before, neither greater or less. 2dly. What is the legal obligation of the parish? And I have no doubt that it is "to keep the church in repair." It is, as stated by Chief Justice North, in *Rogers v. Davenant*,¹ and in Ayliffe's Parergon,² analogous to the liability to repair a bridge or a highway; and should it become necessary to aver in pleading the legal liability of the parish, it would, in my opinion, of necessity be alleged as the duty to repair the church, and not to make a rate, in like manner as the legal duty of a parish must be averred to be to repair the highway, not to make a rate for the

¹ 1 Mod. 194.

² Page 452.

* 726 *purpose. 3dly. What is the true nature of a church rate? In *The Chamberlain of London's Case*,¹ Lord Coke lays it down expressly "that it is an ordinance or by-law which the parishioners have a right to make at common law, without any custom, and that the greater part may thereby bind the whole." In the before-mentioned case of *Rogers v. Davenant*, three of the Judges say the same, and Ayliffe also so states the law. It therefore seems to me clearly established, that a church rate is of the nature of a by-law, and that thereby the persons liable to the duty of making the repairs decide, amongst themselves, that the mode of performing the common obligation which they elect to adopt is to raise a sum of money by a rate. And in my opinion the parishioners, and they alone, are competent to make this election; and if they determine to effect the repairs in any other manner, as by their personal labour, they may legally do so, in the same manner as the inhabitants of a parish might at common law have repaired a highway, or the inhabitants of a county might have repaired a bridge. It is quite true, that for many years a rate has been generally, if not universally, resorted to for the purpose, as the most convenient and equal mode of performing the duty; but before the time of legal memory, when the obligation arose, I have no doubt that the effecting repairs by a rate was a thing almost unknown in country parishes, although in large towns a rate was probably resorted to; rents were then almost universally paid in kind or by personal services, and I have no doubt that rates were so paid also.

As to the main question itself. It is upon all sides acknowledged that the law of England is most careful to protect the subject from the imposition of any tax except * it be founded upon and supported by clear and distinct lawful authority. In the first of the cases which arose out of the controversy in the parish of Braintree, viz. *Burder v. Veley*,² the Court of Queen's Bench, in delivering judgment, stated, "That the law requires clear demonstration that a tax is lawfully imposed." And the same doctrine is distinctly laid down in *Denn v. Diamond*,³ and in a variety of other cases. Indeed it is a legal axiom. It is clear therefore, that the defendants in error who support the present rate, ought, in order to maintain it, to adduce some legal authority

¹ 5 Rep. 68 a.

² 4 B. & C. 245.

³ 12 A. & E. 247.

or judgment, or at least the opinion of some eminent writer upon the subject in their favour. But it is singular that, although in the previous arguments and judgments in the Court of Queen's Bench and the Court of Exchequer Chamber upon the Braintree cases, every authority and opinion and dictum of every kind which exist were brought forward, yet until the judgment in the last of these cases suggested it, it never seems to have occurred to the mind of any one that the minority of the parishioners at a vestry could make a rate, in opposition to the vote and determination of the majority.

In the reigns of King Charles the First and King Charles the Second, the Ecclesiastical Courts in several cases decided that the church-wardens alone could make a rate when the vestry refused ; but in all these cases the making of the rate, and its validity, were grounded, and attempted to be supported, upon the supposed authority and liability of the church-wardens as public officers of the parish (who were alleged to be personally responsible in regard to the non-repairs of the church) to make the rate ; and until the Braintree cases it was never surmised by any one that the votes of the minority of the vestry at all aided towards its legality. * This supposed power of the church-wardens *ex officio* to make a church rate has been on several occasions expressly adjudged to be contrary to law by the Courts at Westminster, and it is stated so to be in the treatises of the most learned writers on ecclesiastical law, viz. Gibson and Ayliffe ; and I believe no authority can be found, certainly none has been cited, that at a public meeting called to impose a church rate, or indeed a tax of any kind, the minority of the meeting may vote it in opposition to the votes of the majority. If it is so in the present instance, it is an anomaly, and requires a clear and cogent legal authority to support it. The only alleged authorities cited for the purpose by the learned counsel for the defendants in error were *Thursfield v. Jones*,¹ *Gaudern v. Silby*,² decided in 1799 by Sir W. Wynn, the Dean of the Arches, and a passage in the Parson's Counsellor³ by Sir Simon Degge.

The case of *Thursfield v. Jones* was a motion to the King's Bench for a prohibition to the Ecclesiastical Court in a suit for a church-warden's rate, suggesting that the parties applying for the

¹ 1 Vent. 367.

* Page 204.

² 3 Curteis, 272.

prohibition had pleaded that the rate was not made with the consent of the parishioners, and that the Spiritual Court had refused the plea. The report then proceeds thus: "The Court said that the church-wardens (if the parish were summoned, and refused to meet or make a rate) might make one alone for the repairs of the church (if needful), because that if the repairs were neglected the church-wardens were to be cited, and not the parishioners, and a day was given to show cause why there should not go a prohibition." It is stated in the judgment of the Queen's Bench,¹

* 729 that search had been made in * the books of the Courts for this case, which occurred in 35 Charles 2, but nothing could be found concerning it. And with respect to it, it is to be observed that it is not a judgment of the Court at all, but a dictum, which, if really made by the Judges in Court, and considered by them to be the law, ought to have induced them to refuse the rule to show cause, instead of granting it; but assuming what is said to have fallen from the Court to be correctly reported, it is entitled to no weight; for it is in direct contradiction to a prior judgment of the Court of King's Bench in 3 Charles 1 (1628), *Roberts's Case*,² and to the judgment in *Rogers v. Davenant*,³ in 26 Charles 2, a few years before; and the subsequent judgment in the Queen's Bench in Banco, in the case of *Pierce v. Prouse*, 7 William 3,⁴ is directly to the contrary, and must, therefore, according to the ordinary mode of dealing with cases at law, be taken to have overruled it. Indeed one would suppose that a dictum or expression of opinion falling from a Court of law upon an application for a rule to show cause bears with it about as little weight of judicial authority as it is possible that any thing falling from a Court of law can bear; and Chief Justice Tindal, in delivering the judgment of the Court of Exchequer Chamber, in *Veley v. Burder*,⁵ was well warranted in saying that the case was extremely unsatisfactory. But, as regards the present question, it has really little bearing, for the opinion of the Court was in express terms in regard to a rate made by the church-wardens alone, and not in regard to one made by a minority of the vestry.

The case of *Gaudern v. Silby*⁶ was a decision in the Arches by Sir W. Wynn, in 1799, that the church-wardens, * upon

¹ 12 A. & E. 251.

⁴ 1 Salk. 165, see ante p. 706, note (z).

² *Hetley*, 61.

⁵ 12 A. & E. 307.

³ 1 Mod. 194–236, pl. 2.

⁶ 3 Curteis, 272.

a refusal by the vestry to make a rate, had by law power to make one. This case was much considered in the original proceedings in the present case in the Ecclesiastical Court, and also in the Court of Queen's Bench in *Burder v. Veley*. Dr. Lushington, in giving the original judgment upon the subject, spoke of it as follows:¹ "I may observe upon this case that I believe its appearance was a surprise upon the whole profession. It certainly was not known to the Ecclesiastical Commissioners, or at least not recollect ed by any member of that Commission, when the subject was then discussed, and during the thirty years that I have been in these Courts I never knew that case adverted to, nor was I aware until lately that such a case was in existence, although it is of forty years' standing." And the Court of Queen's Bench, in delivering judgment, expressly declared it not to be law. And it is to be observed, 1st, that the decision is nothing more than a revival in 1799 of the same doctrine which the Spiritual Court advanced in the reigns of Charles I. and II., of the power of the church-wardens to make a rate, which was expressly adjudged not to be law in several cases by the Courts at Westminster Hall; and 2dly, that there is not a word to be found in it as to the authority of the minority of the vestry.

The third and only remaining authority relied on by the learned counsel for the defendants in error is a passage from Degge's Parson's Counsellor.² [His Lordship read it, see ante p. 702.] The above is the entire passage, and certainly it does not seem to indicate that the writer had a very strong opinion upon the subject, and it would be strange if he had had; for of the authorities cited by him, viz. an *Anonymous case*³ to which I shall hereafter refer, * *Rogers v. Davenant*,⁴ *Roberts's Case*,⁵ and *Thursfield v. Jones*,⁶ before mentioned, none of them, with the exception of the latter, at all justifies his supposed view, and two of them are in direct contradiction to it. The reason also given for it, viz. "That the church-wardens may be compelled themselves to do the repairs," does not seem to be well founded. No authority was cited to establish such liability; and it was observed by the Court of Queen's Bench in the judgment in *Veley v. Burder*,⁷ that unless

¹ Braintree Church-rate Case (by Johnson), 78.

² Page 165.

³ 1 Mod. 79, pl. 41.

⁴ 1 Mod. 194, 236, pl. 2.

⁵ Hetley, 61.

⁶ 1 Vent. 367.

⁷ 12 A. & E. 250.

the church-wardens have supplies they are not personally liable ; but, as I have already observed, the plain and patent objection to these supposed authorities upon the present question is, that they are not at all directed to the alleged power of the minority to make the rate, but to the power of the church-wardens alone, which power has been expressly negatived by several adjudged cases by the Court at Westminster Hall.

To my mind the absence of any authority in support of the doctrine that the minority has power to make a rate ought to be conclusive against it ; but I think there are numerous authorities which show that no such power exists. It was observed by the learned counsel for the defendants in error, that these authorities are only affirmative, viz. that the majority may make a rate ; and that there is nothing negative that the minority may not do it when the majority has refused. I think this is an error, as, in my opinion, several of the authorities are to the effect that the major part, and they alone, can make the rate. But it seems not correct reasoning, when it is laid down in plain affirmative language how a thing is to be done, to allege that the thing may be done in a different manner, because such manner is not in express

* 732 terms negatived. * The first authority relied upon by the learned counsel for the plaintiffs in error was *Jeffrey's Case*.¹ Lord Coke there states that the Court of King's Bench required the opinion of the professors of ecclesiastical law in regard to the question of church rates, and that divers of them certified under their hands in writing, " That the church-wardens and greater part of the parishioners, on a general warning met together, might make such a tax by the law." Now, with great respect for those who have expressed a different opinion, I think Lord Coke clearly understood, and meant it to be understood by others, that the legal mode of making a church rate was by the church-wardens and the greater part of the parishioners assembled together by public notice at a public meeting ; and that he meant to negative any other mode of making the tax.

The next case was *Roberts's Case*,² 3 Charles 1. The inhabitants of Greenwich had sentence given against them in the Spiritual Court to pay a church rate made by the church-wardens. They appealed to the Arches, and the sentence was confirmed. They then applied to the Court of King's Bench for a prohibition, and

¹ 5 Rep. 67.

² Hetley, 61.

it was granted. The report stated, that the Court agreed that the tax cannot be made by the church-wardens ; but by the greater number of the parishioners it may. This is one of the cases referred to by Sir Simon Degge in the passage above referred to ; it is obvious that, so far from justifying his view, it is directly to the contrary. It is also the first of several cases reported in the Common Law Reports in which the Ecclesiastical Courts in the reigns of the Stuarts seem systematically to have decreed for payment of church rates made by the church-wardens alone. The Courts of Common Law, however, with the exception of the dictum in *Thursfield v. *Jones*,¹ uniformly denied their legality ; *733 and after the case of *Pierce v. Prouse*,² 7 William 3, the Spiritual Courts appear to have abandoned the doctrine, until the decision in *Gaudern v. Silby*,³ in 1799, which, however, according to Dr. Lushington, has not been acted upon since.

The next case cited in order of time was *Anonymous*,⁴ 23 Charles 2 ; and, except that it is referred to by Sir Simon Degge as an authority for the passage before mentioned, it would not be worth quoting. The following is the whole of it : “ Counsel moved for a prohibition to the Spiritual Court, for that they sue a parish for not paying a rate made by the church-wardens only, whereas by law the major part of the parish must join. Twisden, Justice.—Perhaps no more of the parish will meet together. Counsel.—If that did appear it might be something.” A case so reported is really worthless as an authority ; but at the utmost it amounts to this : the counsel stated the law to be, that the major part of the parish must join in making the rate. The Judge then observed, that if no more of the parish than the church-wardens would come to the meeting, the latter would have power to make it ; and according to what fell from the Court of Queen’s Bench and Exchequer Chamber this might be so, for the church-wardens would then be the legal vestry, and the majority of the vestry can make the rate.

The next case is *Rogers v. Davenant*,⁵ 26 Charles 2, which is universally referred to as the leading case upon the subject. The report merely gives the judgment of the Court. [His Lordship read it.] Now this case seems to me a direct authority that

¹ 1 Vent. 367.

² Salk. 165.

³ 3 Curteis, 272.

⁴ 1 Mod. 79, pl. 41.

⁵ 1 Mod. 194, and see 236, pl. 2.

* 734 the majority alone can make the * rate ; for the parishioners who are willing to contribute are not to make a rate, but are to be absolved ; and every one of those who are not willing is to be excommunicated until the greater part of them (or, in other words, the majority) shall agree to assess the rate. The case, therefore, clearly shows that the majority alone can make the rate, and that the dissentients are to be coerced until a majority shall make it. The case also confirms Lord Coke's doctrine, that the rate is in the nature of a by-law.

The next case is *Saint Mary Magdalen, Bermondsey*,¹ 29 Charles 2. The report consists of several resolutions, and I have no doubt they were the resolutions of the Judges in the Court of Exchequer Chamber ; the Court of the highest authority in this kingdom, next to that of your Lordships. The report, as regards the matter now in question, is as follows : " In a prohibition it was the opinion of the whole Court, that if a church be out of repair, upon a general warning or notice given to the parishioners, the major part then present, and meeting according to such notice, may make a rate. The bishop or his chancellor cannot set a rate upon the parish ; it must be done by the parishioners themselves." Now this seems to me to be not merely affirmative that the major part present can make a rate, but a clear declaration of the Court that the mode, and the only mode, of making a church rate is by the majority of the parishioners meeting together in pursuance of a notice.

The next case is *Wayte v. German*,² 32 Charles 2. It was a motion for a prohibition. The counsel (Baldwin) in moving for the rule, admitted that in case of necessity the major part of the parish could bind the rest ; but argued that in the libel it * 735 was not alleged that the * major part had made the rate.

To this Chief Justice North answered : " It is said that the parish, or some of them, did rightly make the rate ; and can that be understood otherwise than of the major part ? And if but forty of the parish appear, the major part may tax the whole." Mr. Justice Charlton said, that the best objection to the rate was that the libel did not state absolutely that the major part agreed to the tax ; and Mr. Justice Levinz doubted, because the libel did not expressly declare that the major part consented, and desired to have the libel amended ; but Chief Justice North and Wyndham

¹ 2 Mod. 222.

² 2 Show. 141.

were of opinion that it was well enough, since it was alleged "that the rate was rightly made," and the prohibition was refused. The reporter, Sir Bartholomew Shower, seems to have concurred with Mr. Justice Levinz, for he adds, "*Sed quære legem.*" Now this again is a direct authority that the majority must concur, and that it must so appear on the libel. Mr. Justice Levinz thought it must appear expressly; the other Judges thought it sufficient if it appeared by necessary implication, and that it did so appear when it was averred that the rate was rightly made, or, in other words, that to make the rate rightly the majority must concur.

The next case in order of time is *Thursfield v. Jones*,¹ 35 Charles 2, which is relied on by the defendants in error, and which I have already mentioned; and the last and concluding one is *Pierce v. Prouse*,² 7 William 3, reported in a great number of other books by this name, and also by other names, *Hawkins v. Rous*, *Pierce v. Prouse*, &c.;² but in which all are agreed that the Court adjudged that the parishioners, and not the church-wardens, ought to make the rate. This was after the Revolution,* and seems * 736 to have ended the controversy until 1799, when Sir W. Wynn decided *Gaudern v. Silby*,³ when again the question seems to have slept until it was revived in the cases arising out of Braintree parish. These, I believe, are all the authorities upon the subject, and the result seems to be, that originally the opinion was that the major part of the parishioners assembled at a meeting in pursuance of notice were the proper parties to make the rate; that in the time of the Stuarts the Spiritual Courts, in several instances, decided that the church-wardens alone could make it; that this doctrine was steadily resisted by the Courts of Westminster Hall, and apparently set at rest by the case of *Pierce v. Prouse*, in the year 1695; that in 1799 Sir W. Wynn, the then Judge of the Arches, anew asserted the right of the church-wardens to make the rate; but that on the first occasion when this doctrine was brought under the cognizance of the Court of Queen's Bench, in *Burder v. Veley*,⁴ that Court, in the most explicit terms, adjudged it to be contrary to law, which judgment was affirmed in the Court of Exchequer Chamber, and no writ of error brought thereon to this House.

In addition to these cases there were cited on behalf of the

¹ 1 Vent. 367.

³ 3 Curteis, 272.

² 1 Salk. 165; see ante p. 706, note (z).

⁴ 12 A. & E. 233 - 265.

plaintiff in error passages from two works of great authority upon ecclesiastical law, viz. Gibson's Codex, and Ayliffe's Parergon. The law is thus laid down in Gibson :¹ " Rates for the reparation of the church are to be made by the church-wardens together with the parishioners assembled upon public notice given in the church, and the major part of them that appear shall bind the parish, or if none appear the church-wardens may make the rate, because they, and not the parishioners, are to be cited and punished

* 737 * in default of repairs; but the bishop cannot direct a commission to rate the parishioners, and appoint what each shall pay. This must be done by the church-wardens and parishioners, and the Spiritual Court may inflict spiritual censure until they do."

In Ayliffe,² the law is thus stated : " The Spiritual Court may compel the parishioners to repair the parish church if it be in decay or out of repair, and may excommunicate every one of them, severally, until the greater part of them do agree to assess and levy a tax for the repair thereof; and such as are willing to contribute thereto shall be absolved. The church-wardens cannot themselves impose a tax for the repair of the church, but the greater part of the parish may make a by-law, and to this effect they are a corporation. If a church be fallen down, and the parishioners are so increased that of necessity they must have a larger church, a tax may be raised by the major part of the parish as well for enlarging it as for repairing it. Nor is the consent of every parishioner necessary to the imposing a tax in such case for enlarging the church, for the greater part of the parish shall control the less for enlarging a church as well as for repairing it." Ayliffe also in other places uses the expression " greater part of the parish," and in commenting upon the punishment upon persons refusing the rate he speaks of them as " severally culpable." It is quite clear that both these writers deny the power of the church-wardens to make a rate in the sense in which Sir W. Wynn held they had such authority in *Gaudern v. Silby*. And to my mind the passage in Gibson clearly shows that he had no idea that the minority at a vestry could overrule the majority, but, on the contrary, that the major part of the parishioners * or those alone who attended could make the rate. But as to the passage in Ayliffe there is no room for doubt; he uses the clear and unambiguous expression, " greater

¹ Vol. I. tit. 9, c. 4, § 2.

² Page 455 and the following pages.

part of the parish," and he says, "the greater part of the parish shall control the less," and he speaks of the persons refusing the rate as severally culpable, and that the persons willing to make the rate shall be absolved, and that the Spiritual Court shall excommunicate every of them severally until the greater part of them do agree to make the rate. He, therefore, clearly negatives the power of the minority to make a rate; for, according to the law as laid down by him, each of the refusing majority may be severally excommunicated, and thereby coerced, until the greater part of the parish shall agree, which is utterly inconsistent with the idea that the willing minority can of itself make a valid rate. Ayliffe's book is stated, by Lord Chief Justice Tindal, in the judgment of the Court of Exchequer Chamber in *Veley v. Burder*, to be one of high authority. I am, therefore, of opinion that the above are direct authorities that the minority of the vestry has not power to make a church rate; and there is not, I believe, the slightest intimation or suggestion to be found anywhere, before the discussion on the Braintree cases, that such power exists. The power so long contended for by the Ecclesiastical Courts was not for the minority of the vestry to make the rate, but for the church-wardens alone, by virtue of their office, and by reason of their being personally responsible in respect of the non-repair; and in my judgment the authorities before cited ought to be conclusive upon the present question.

But the rate was also alleged to be lawful upon abstract reasoning. It was argued that unless this was a lawful rate the greater number of the parishioners would have compelled the others to do an unlawful act. I think this is *a fallacy. *739 Assuming that the legal duty of the parish was to make a rate, the minority did no unlawful act whatever. The majority acted unlawfully, and every one liable to be punished in the Ecclesiastical Court in such manner as the law provides; but the minority did nothing unlawful, and was liable to no punishment whatever. The case of *Rogers v. Davenant*, and the passage in Ayliffe, are conclusive upon this point. If this reasoning is correct, the consequence would be that, assuming the church to be out of repair, and a vestry called, the church-wardens and one parishioner, indeed the church-wardens alone, they being members of the vestry, or even one church-warden against the will of the other, could make a rate in opposition to all the rest of the parishioners; for if the doctrine is correct that the acts of the majority

are to be deemed null, and they therefore are to be considered as absent from the vestry, and not voting at all, the person or persons voting for the rate would alone constitute the vestry.

It was also urged that an analogy in favour of the rate was afforded from the proceedings of constituencies for the election of Members of Parliament and of corporate meetings for the election of officers. But I think the proceedings for the election of members of a representative body or of corporate officers are substantially different from the proceedings of the body itself in the transaction of its business. In *The King v. Monday*, Lord Mansfield says :¹ “ Upon the election of a Member of Parliament, when the electors must proceed to an election because they cannot stop for that day or defer to another time, there must be a candidate or candidates ; and in that case there is no way of defeating the

¹ Upon the election of one candidate proposed but by voting for another. But in the business of corporations it * is a different thing.”

At an election, by common law it is only necessary that there should be a majority for one candidate over every other candidate. There may be as many candidates as there are electors, less one, and the votes of two would carry the election, however numerous the electors, if all the others voted for separate candidates, and the vote of one would be a lawful election if no other elector voted. But, as remarked by Lord Mansfield, voting in the business of the body is a very different thing, and I apprehend it is clear law, and exemplified every day in the proceedings of your Lordships’ House, and of the House of Commons, and of corporate bodies, that for the transaction of business, viz. making a law, imposing a tax, making a by-law, in fact, transacting any business whatever, there must be, 1st, a lawful meeting ; and 2dly, a vote of the majority ; and unless the majority votes for the law, tax, or by-law, it is not carried.

The cases cited of *Oldknow v. Wainwright*,² *Taylor v. The Mayor of Bath*,³ and *Rex v. Hawkins*,⁴ are all instances of the same principle ; and further, that if a candidate be legally disqualified to fill the office, votes given in his favour, after notice of the disqualification, are thrown away, and as if they had not been given at all. But no instance has been cited of the principle being applied to the transaction of business. In my opinion, therefore, neither

¹ Cowp. 538.

² 3 Luders, 324.

³ 1 W. Bl. 229.

⁴ 10 East, 211.

this analogy nor abstract reasoning supports the rate. The persons constituting the majority of the vestry were free agents. If they have acted illegally they are liable to be punished in such manner as the law directs; but it would be, in my opinion, contrary to law to hold that any tax can by the common law be imposed by a public body unless the majority of the body present at * a lawful meeting shall vote for it. In very * 741 early times the Spiritual Courts obtained jurisdiction in respect of the repairs of churches, and the Statute *Circumspecte Agatis*, 13 Edward 1, clearly shows that the controversy then was, not as to the making of rates, but whether the Ecclesiastical or the Temporal Courts had jurisdiction in respect of them. The parishioners were then all of one faith, and as their duty was to repair the parts of the church where they themselves sat, it might be and was well left to the majority to make provision for their own accommodation. The Ecclesiastical Courts succeeded in obtaining exclusive jurisdiction on the subject, and they then possessed the most effectual powers of enforcing it that were probably ever enjoyed by any legal tribunal, viz. interdict in the event of the whole parish being contumacious, and the excommunication of individuals refusing to repair. In the progress of time these means of enforcement have become inefficacious, and the consequence is the same which has occurred in very many other instances from the same cause, viz. that recourse must be had to the Legislature; but, in my opinion, a Court of law has no power to administer a remedy.

In answer to the questions put by your Lordships, I have therefore to reply, that in my opinion the present record does show that the rate sought to be enforced is an invalid rate.

2dly. That the rate does not appear to be a valid one; and,

3dly. That prohibition lies against the enforcement of the rate in the circumstances apparent upon the record.

MR. JUSTICE TALFOURD.—The first question — whether the present record shows the rate sought to be enforced to be an invalid rate — * involves that consideration which is of * 742 the most general moment of those which the questions put by your Lordships to the Judges raise. That consideration applies to the condition of a minority of parishioners, duly convened and assembled in a vestry, at a time and place appointed by a monition

of the Consistorial Court, for the performance of a duty of unquestionable and perfect obligation, upon the repudiation by the larger number of that duty, and after an absolute refusal on their part to perform it. On the one hand it is contended, that the persons present constitute a deliberate assembly for the purpose of determining the mode of performing their duty ; that the majority have the power which is essential to such a body, to bind the minority by vote, by which vote they may refuse to perform it ; and that, consequently, the subsequent proceedings of the minority to discharge the obligation for which they were convened are void. On the other hand it is urged, that the duty being plain, and the exigency for its performance undisputed, the propriety of fulfilling it was no proper subject for deliberation or vote ; that, by a general refusal to obey the law, the majority present abrogated their functions of deliberation, which only belonged to them so far as to determine the manner in which the law shall be obeyed ; and that they could not prevent their fellow-parishioners from performing the duty cast by the law upon all. I think the latter is the correct opinion.

Up to the point of time when the resolution was voted by the majority of the persons assembled in vestry, repudiating the proposal for the execution of which they were convened, there is no controversy either as to the facts or the duty arising out of them. It is conceded as matters of fact that the parish church of Braintree was out of repair, that a large sum was required to

* 743 repair its fabric, that a * monition had issued from a Court of competent authority requiring the parishioners to assemble in vestry, and there on a certain day to make a rate for the reparation of the church ; that the parties who actually made the rate, with others hostile to all church rates, met at that time and place, and that being so met it was their duty to provide for the repair so needed, either by the accustomed course of general assessment or by some other mode equally efficacious. It is admitted that an estimate of the necessary cost of repair was produced, to which no objection was offered ; that no provision for repairs other than by means of a rate was suggested ; but that, on a rate being proposed, the majority of parishioners present voted an amendment comprising an elaborate censure of the law which they were assembled to obey, and a distinct refusal in any manner to comply with its requisitions. Were the numbers composing the

minority then in the position of parties regularly outvoted on a question within the province of the body, or did they then become, for the legitimate purpose of their meeting, the parishioners in vestry assembled capable of performing the act in which their fellows had refused to participate? I do not think the analogy suggested between the capacity of corporators assembled to elect a corporate officer, when the majority refuses to vote or persists in a vote which is illusory, and the present case, is perfect; but I think that the right, or rather the duty of the minority, in this case, to proceed with the business in which they have been obstructed rests on higher grounds than that of such corporators willing to proceed to an election.

The duty which the parishioners were assembled to perform, and bound to perform, is now admitted to be as clear as any which the common law of England has associated with the occupation of houses and land, as the maintenance of bridges by the occupiers of land in counties, and the * repair of highways * 744 by those who occupy land in parishes. And the law has vested, not the right to consider whether that obligation shall be discharged, but the right to determine the manner and proportion of its performance, in the inhabitants of each parish assembled in vestry. The repair of the fabric of the church was described by Lord Chief Justice Tindal, when delivering the unanimous judgment of the Court of Exchequer Chamber, in the case of *Veley v. Burder*, as a duty which the parishioners are compellable to perform; not a mere voluntary act, which they may perform or decline at their own discretion.¹ This position, thus strongly and clearly expressed, was not contravened in the argument at the bar; and if it is true that "the only question the parishioners can by law determine is how they shall discharge their obligation," does it not follow that those who alone consent to determine this question may determine it, and thus accomplish the purpose of their meeting? Does not opposition to the only subject of deliberation become obstruction? If obstruction, is it not unlawful obstruction? And can unlawful obstruction be, by the operation of the law itself, permitted to prevent the performance of an imperative duty? It is not denied that, in ancient time, the parishioners were liable, on the refusal of the vestry to make a rate, to be visited either by excommunication or interdict, and that al-

¹ 12 A. & E. 301.

though in the first case the individual recusants might be selected for censure, in the latter a deprivation of all religious rites would fall on the entire parish. At the present time an interdict would be impossible, or if possible would be hailed with triumph by the parochial adversaries of the church. But the common law has not changed with this change of circumstances and feelings ; and if the parishioners willing to perform their duty could in old time have rescued themselves from the consequences of parochical contumacy by performing it, the same course must be open to them now when they are impelled by some other motive than that of fear.

Against this view of the question it has been urged that a church rate is in the nature of a tax, and that no one can be taxed without consent, express or implied ; but is this a tax which the vestrymen impose, or a burden which they distribute ? The right of the church — that is, of the inhabitants of the parish, whether rateable or not — to have the fabric of the church maintained by the occupiers of real estate, is as well established as the right of the occupiers of that estate to their possession, or of the landlords to their reversions. It arises out of the same law, and it is defended by the same sanctions. The way to vindicate that right may lie only through the Ecclesiastical Courts ; but the charge rests on foundations no less ancient than those which secure the exclusive title to the lands upon which it is laid. As then the burthen is imposed, not by the vestry, but by the law itself, and as the parishioners at large in this case enjoyed the full opportunity of regulating its distribution, which the majority abstained from using, I think their fellows, assembled at the proper time and place to obey the law, were in a condition to obey it, by making a valid rate, not as a minority decides against the majority, but as the entire body of men who choose to deliberate and vote on the proper subjects of deliberation and decision. And as the record states that, on that occasion, a rate was made in fact, and as there is no circumstance inconsistent with the making a valid rate stated on this record, my reply to the first question is in the negative.

2. But in reply to the second question of your Lordships, I think that the rate does not necessarily appear to be a valid rate ; because it does not appear whether it was affirmed on a question duly proposed, and voted by a majority of

those who had not repudiated their duty ; and although no precise form may be necessary for ascertaining the opinion of those who have a right to vote on the amount and distribution of the common burthen, I think the statement of the proceedings subsequent to the anti-rate resolution is too loose to maintain the affirmative proposition that the rate is valid.

3. In reply to the third question, I have to state that it appears to me that "prohibition does not lie against the enforcement of the rate in the circumstances apparent on the record," because I think that to sustain prohibition on matter apparent on the record, it must affirmatively appear that the rate, the enforcement of which is sought to be prohibited, is invalid. The Court to which the prohibition is sought has clearly jurisdiction over the subject matter before it; and in such a case, it appears from all the authorities, that prohibition may not go unless it distinctly appears that the proceeding is invalid, and that therefore the Court would exceed its jurisdiction, if permitted to enforce it. The authorities are collected in Comyns's Digest.¹ And as I think, for the reasons I have offered in answer to the first question, that the rate in this case may be valid, consistently with the statements on the record, my answer to the third question is in the negative.

MR. JUSTICE WILLIAMS.— Of the three questions proposed in this case by your Lordships for the consideration of the Judges, I answer the first and the third in the affirmative, and the second in the negative.

With respect to the doctrines of law applicable to the * subject of these inquiries, they have been freed from all * 747 doubt by the case of *Veley v. Burder** in the Exchequer Chamber. Before that decision, it had long been established that to repair the body of the parish church is a common-law duty of the parishioners, which they are compellable by ecclesiastical censures to perform ; and since that decision, it is clearly settled that if, in order to perform that duty, a church rate is to be made, the only legal mode of making it is at a duly convened vestry, by the order of the majority of those parishioners who are there present.

With respect to the facts apparent on the record in this case, the result of them seems to me to be, that, the parish church of Braintree being in need of repairs, a monition had duly issued

¹ Prohibition, D.

² 12 A. & E. 233, 265.

from the Ecclesiastical Court, monishing the church-wardens and parishioners to take the proper steps for putting the church into repair, by holding a vestry meeting on a specified day, for the purpose of making, and then and there to make, the requisite rate; that a vestry was duly held in pursuance of this monition, and that certain proceedings there took place, the substance of which is, I think, accurately stated, with great precision and clearness of expression, in the language of my learned brother Maule's judgment in this case when in the Exchequer Chamber, as follows:¹ "The greater number of persons present at the vestry refused to make any rate, and proclaimed to all the others their refusal so to do, grounding their refusal on reasons which showed that their determination was to refuse in any manner to concur in enforcing by compulsory means the repair of the church; and thereupon a rate was made with the concurrence of all present, except those who were determined not to make any rate whatever."

*748 And I agree with that learned Judge that, supposing this * to be the substance of the proceedings in vestry, the question is whether, when the majority of a vestry, assembled as this was, refuses to make any rate, those who are willing to make one can make a valid one. But I am of

opinion that they cannot do so. If the majority are to be regarded as still present in vestry, and dissenting, then the rate was manifestly made by a minority, and in spite of and against the wishes of the majority, and cannot, I think, be supported, without abandoning the rule of law established by *Veley v. Burder*. Of that rule it seems to me to be a consequence, which, though it may be lamented, is inevitable, that if the majority in vestry resolve not to do their duty, they may thereby prevent those who are willing to do it from doing it; as, for example, by voting for a rate to a very small amount, when it is their duty to make a rate to a very large amount, inasmuch as the necessary repairs of the church require it. But it is argued that, though in fact the dissenting majority was present in vestry, yet, according to the principles of law, they ought to be regarded, in theory, as absent or acquiescing, and therefore to be omitted from the reckoning of those who were present. And reliance is principally placed on the authority of the cases relating to elections by corporate bodies, in which it has been held that they who vote for an

¹ 12 Q. B. 373.

unqualified candidate throw away and lose their votes. But I agree with the view which my learned brother Parke has taken of these cases, in his judgment in the Exchequer Chamber; viz., that they do not establish any legal principle that the voters who vote for an unqualified candidate acquiesce in the election of him who is actually elected; but that the cases depend on the rule that the qualified candidate who has the most votes of the persons, be the number what it may, of the electing body, and whether it constitutes the majority of that meeting or not, is the person duly elected. I think, therefore, *that there is no au- *749 thority or principle of law which can justify the suggestion that the majority who, in point of fact, were present and dissenting, ought to be regarded, in point of law, as absent or acquiescing.

On these grounds, I am of opinion that the rate appears to be invalid, and that, instead of seeking to enforce it, the proper course is to proceed against the parishioners by ecclesiastical censures. If this course should be deemed unjust, by reason of involving in the punishment for neglect of duty, the minority who were willing to perform it (a consequence, however, by no means singular with reference to parochial obligations), or ineffectual, because ecclesiastical censures have lost some of their terrors, by reason of having been deprived of some of their powers, this may be a good reason for the interference of the Legislature, but cannot justify the Judges in varying or dispensing with the law as they find it established.

I therefore beg to answer your Lordships' questions by expressing my opinion that the record shows the rate in question to be invalid, and that prohibition lies against the enforcement of it.

MR. JUSTICE ERLE.—According to the tenor of the judgments in all the Courts below, it is clearly established that the parishioners in vestry assembled alone have the power of making church rates, and that the concurrence of the majority of those present is essential to the exercise of that power. I assume, therefore, that the law upon the case is so far clear. It results that the matter for decision is in the nature of a matter of fact,—whether the majority of the parishioners in vestry assembled concurred in the making of the rate in question; and it appears to me that they did not. They dissented, and expressed their dissent in the most

* 750 unequivocal * manner. There were no regulations requiring this expression to be made in any particular form. They complied with the law if they made themselves understood, and about their intention there never has been a doubt.

In the judgment for the respondents, it appears to be assumed that dissent expressed in an unjustifiable degree ceases to operate as dissent, and becomes neutral, and that the dissent of the majority of the parishioners was expressed in an unjustifiable degree. But neither of these positions seems to me to be well founded. Where a resolution is lawfully offered to a deliberative assembly for approval or dissent, and there are no regulations of form, every member has a right to express his dissent as he may choose, and a relevant dissent from the proposed resolution is not affected by an irrelevant declaration of intention to dissent from all similar resolutions in future.

If the parishioners have a right to deliberate and vote upon the granting of a church rate, they have the right and the duty to speak and vote as they think right, and neither the speech nor the vote so offered is a violation of the law. The wrongful omission to repair the church is a violation of law, and the refusal of the rate may by consequence lead to this violation of the law ; still, the omission of repair, and not the vote, is the offence, and the subject of punishment.

If the majority of the parishioners violated no law by the manner in which they expressed their dissent from the rate proposed, it seems to follow that there is no legal warrant for finding their act to be null. Although it is a rule of law that, upon an election of one among several candidates, a vote for a person known to be incapable of being a candidate is null, still, that law of election has no analogy to the vote of a parishioner for or against a church

rate. If the majority in the vestry in question had voted
* 751 against * something not proposed, as against a highway rate, there would be an analogy, and a reason for holding such a vote to be a nullity ; but a vote against a proposed church rate is no more annulled by an intention to vote against all future church rates, than a vote for a lawful candidate at an election would be annulled by an intention to vote for him at all future elections. The resolution of the persons composing the majority seems to me neither irrelevant nor purposeless. They dissented from the proposed church rate, and declared the ground of their dissent, in

order that their rights and liabilities might be settled, and that those who had the duty of enforcing the law might have no difficulty about evidence. Such dissent appears to me to be neither consent nor neutrality.

My answer to the first question is, therefore, in the affirmative; to the second, in the negative; and to the third, in the affirmative.

MR. JUSTICE WIGHTMAN. — As it appears to me that the church rate now in question between the parties is a valid rate, it will not be necessary for me to give separate answers to the questions proposed by your Lordships.

Of the four Courts before which the case has been considered, the judgment of three has been in favour of the validity of the rate; but in the last of these, that of the Exchequer Chamber, the Court was not unanimous, four of the Judges, out of seven who composed it, being of opinion that the rate was valid, whilst three were of a contrary opinion, and considered the rate invalid, for reasons given in their several judgments, and which, as it seems to me, contain every argument that great learning and experience could suggest in support of the view of the question which they have taken. And in fact the whole subject * is * 752 . exhausted, by the several judgments that have been given by the learned Judges who composed the Court of Exchequer Chamber, and which are now before, and under the consideration of your Lordships; and the opinion that I now offer to your Lordships is founded mainly upon a consideration of those several judgments. [His Lordship here stated the facts of the case.]

It appears to me that the majority who supported the amendment must be understood as refusing to make any rate whatever, and not as objecting to the amount or terms of the rate proposed, and that it was, therefore, as far as they were concerned, quite unnecessary again to put the question with regard to the particular rate, and that it would have been merely futile to have done so. Indeed, the question was asked, whether any other rate was proposed, and no answer was given. I also think that it sufficiently appears, by reasonable intendment, though not precisely stated, that the rate was made by all of those present who were willing to make a rate at all, or at least by a majority of them, though the whole might be, and indeed were, a minority of those present at the vestry; in short, that those who concurred in making the

rate were a minority, as compared with those who refused to make any rate at all. It may be considered as now settled, that there is a legal obligation upon the parishioners to repair the body of the parish church, and to provide things necessary for the performance of divine service therein ; indeed, that is not disputed in the present case ; but there is some difference of opinion as to the legal means of fulfilling that legal obligation, where its fulfilment is resisted. It is said that, although the parishioners are bound by law to repair the church, and to provide all things needful for divine service, and may, if they please, do so by means of a rate,

they are not obliged to take that course, but may adopt

* 753 * any other that will suffice for the purpose. It is not easy

to suggest a mode by which the obligation to repair the church, and provide other things needful, can be discharged by the parishioners, as a body, otherwise than by a rate. Benevolent individuals may voluntarily undertake the whole charge, or individual parishioners may agree to supply particular portions of the work amongst them, but performance of such work cannot be imposed upon or enforced against individual parishioners by any order or by-law made by the vestry. The only practicable mode in which the legal obligation cast upon the parishioners as a body can be fulfilled by them as a body is by a rate. If, indeed, the church-wardens, as such, are possessed of goods belonging to the church, they may, by assent of the parishioners, dispose of such goods, and employ the proceeds for the necessary service of the church, as was decided in *Methold v. Winne*.¹ But the mode of disposal is only an excuse for what would otherwise be a breach of duty ; and that case by no means warrants the conclusion, that the property belonging to the church might in the first instance be disposed of by the parishioners in vestry, for the repair of the church, though the minister and church-wardens should be unwilling. I apprehend, then, both from authority and the practice of ages, founded, no doubt, upon necessity, that the only mode by which the parishioners, as a body, can fulfil their legal obligation to repair the church, is by a rate, and that the making such rate is as much a legal obligation upon them as that of the repair of the church. The monition, indeed, calls upon them in terms to make a rate, and the vestry is summoned for that express purpose. What, then, is the nature of that rate which the parishioners

¹ 1 Rol. Abr. 393, tit. Church-wardens.

are required to make for the reparation of the * church? * 754
The late Lord Chief Justice, in delivering judgment in the case of *Veley v. Burder*, referred to a case cited from the Year Book, 44 Edward 3, as establishing the fact that church rates were made by the parishioners at so early a period as the year 1370, and showing that such a custom existed beyond the time of legal memory, and was no other than the common law of England. Such a rate, or rather the order for it, is said in that case, and also by Lord Coke, in *The Chamberlain of London's Case*,¹ to be in the nature of a by-law, and for this purpose, as appears from the case of *Rogers v. Davenant*,² they are a corporation. If, then, the church is out of repair, and there is no church property available, as in *Methold v. Winne*, the parishioners, who are bound to repair it, can only do so by means of a rate, to be made pursuant to an order or by-law of the parishioners assembled in vestry; and the power of the parishioners, with respect to such order or by-law, differs from the powers usually possessed by corporations; the inhabitants of the parish cannot by law refuse to make an order or by-law for a rate when the church is out of repair, and a monition is issued to compel them to repair it, and to assemble in vestry, and make a rate or by-law for that purpose. The terms of the order or by-law, as to the amount, may indeed be within their discretion, but not the making or refusing to make it altogether.

In the present case the majority of the inhabitants refused to do what the law requires. The question was not whether the proposed rate or by-law was proper, if any was made, but whether there should be any at all; and the majority resolved that there should be none. What, then, is the minority to do? Or, rather, what are they to do * who are willing to obey the * 755 law, and make a rate? I cannot but think that there is some fallacy in taking in too strict a sense the term "by-law," as used in speaking of the rate to be made for the repair of the church, and applying to it the rules of law that regulate the making of by-laws by corporations in general. It is said that no by-law of a corporation can be made but by a majority. No doubt that is so, there being no legal obligation upon the corporation to make it, and no breach of legal duty in refusing to do so; but there is a wide distinction between the making such a by-law and a church rate, which it is obligatory on the inhabitants to

¹ 5 Rep. 63 a.

² 1 Mod. 194.

make, and contrary to law to refuse. If the majority could bind the whole, they would make the willing minority parties to their illegal refusal, and subject them to the legal consequences of such refusal. It may be, that the majority might not much regard the illegality or the consequences ; but the minority may be unwilling to act illegally, and may dread the penalty. Is there, then, any principle known to our law which can be applied to such a case, and by the aid of which the consequences of the refusal of the majority to act according to law may be avoided, and the monition, which it is not disputed was legally issued, obeyed.

The inhabitants were summoned to a vestry to perform a particular duty required of them by legal authority. The majority of those who attended refused to perform that duty, and their presence was useless ; it was in effect the same as if they had stated that they would take no part in making a rate, which was the business for which they were summoned. I cannot distinguish, in principle, this case from that of a corporate meeting summoned, in pursuance of a mandamus, to elect a corporate officer. Suppose that only one person is proposed to fill the office,

and he perfectly eligible, but that the majority resolve that
*756 they will * not elect anybody, and this without objecting to

the person proposed, or bringing forward anybody else ; the minority may elect in such a case. The case of *Oldknow v. Wainwright*¹ is an authority for this, which indeed has not been questioned. The vestry can hardly be called a deliberative assembly for the purpose of making a rate when the church is out of repair, and the parishioners are called upon by competent authority to make it ; for they are bound by law to make one. They may be and are deliberative as to the amount of the rate, but not as to the making any. It is not denied that a valid rate can only be made by an absolute majority of those who are willing to make a rate at all, and that a relative majority is insufficient. If three different amounts of rate had been proposed, that which had the greatest number of votes could not have been maintained unless such number proved a majority of the whole who voted. No question of that kind, however, arises in the present case. The only question at the vestry was between a rate of 2s. and none at all. They who by their votes refused all rate whatever did that which the law would not allow, and by the analogy of the

¹ 1 W. Bl. 229, 2 Burr. 1017.

case of election to corporate offices, already referred to, may be considered as virtually absent, and declining to co-operate with the rest in that which was required of them by law.

Upon a review of the various authorities and opinions which have been cited and examined in this case with so much care and learning, it seems to me to be established,— That there is a legal obligation on the inhabitants of a parish to repair the church; that such obligation can only be performed by means of a rate imposed by the inhabitants in vestry; that the inhabitants of the parish are bound to make the rate when necessary, and they are required to * do so by competent authority; that * 757 if the majority of those assembled in a vestry held for the purpose of making a rate shall refuse to make any rate at all, though the want of repairs is admitted, and the amount of the rate is not in question, they are to be considered as declining to take part in the business for which the vestry has assembled, and, for that purpose, as virtually absent; and that, under such circumstances, a majority of those willing to obey the law, and to make a rate, may make one, though the whole of the persons willing to make such rate are a minority, as compared with those who refused to make any rate at all.

I therefore think that the rate in question was good.

MR. BARON PLATT.—The questions proposed by your Lordships to her Majesty's Judges arise upon a demurrer to a declaration in prohibition. [His Lordship fully stated the circumstances of the case, and the facts out of which the questions had arisen.]

The main question therefore raised by this demurrer is, whether the plaintiff has shown by his declaration that the Court Christian had no jurisdiction to enforce the payment of the rate made upon him; and this must depend upon the allegations in the libel, as set forth in his declaration. If they are insufficient to give the Court jurisdiction, he will be entitled to judgment; and if they are sufficient, he ought to fail.

I cannot bring myself to doubt the correctness of the unanimous judgment of the late Lord Chief Justice Tindal, the late Lord Abinger, Mr. Baron Parke, the late Mr. Justice Bosanquet, Baron Alderson, the late Mr. Justice Coltman, Mr. Justice Maule, and Lord Cranworth, delivered by the late Lord Chief Justice Tindal, in *Veley v. Burder*. The obligation of the parishioners

* 758 with reference * to the reparation of the fabric of the church is, after reviewing all the authorities, thus laid down with remarkable distinctness : " Such being the law of the land, it follows as a necessary consequence that the repair of the fabric of the church is a duty which the parishioners are compellable to perform ; not a mere voluntary act, which they may perform or decline at their own discretion ; that the law is imperative upon them absolutely that they do repair the church ; not binding on them in a qualified, limited manner only, that they may repair or not, as they think fit ; and that where it so happens that the fabric of the church stands in need of repair, the only question upon which the parishioners, when convened together to make a rate, can by law deliberate and determine, is, not whether they will repair the church or not (for upon that point they are concluded by the law), but how and in what manner the common-law obligation, so binding upon them, may be best and most effectually, and at the same time most conveniently and fairly between themselves, performed and carried into effect. The parishioners have no more power to throw off the burthen of the repair of the church than that of repairing bridges and highways ; the compelling of the performance of the latter obligation belonging exclusively to the Temporal Courts, whilst that of the former has been exercised usually, though perhaps not necessarily exclusively, by the Spiritual Courts from time immemorial." Assuming the doctrine thus laid down by that most learned conclave of Judges, and seeing that the church of Braintree was in a state of dilapidation and in urgent need of repair, and that 2s. in the pound was a reasonable assessment, one may safely conclude that the plaintiff was liable to the rate in question, provided all the formalities in making it had been observed.

In obedience to the monition of the ecclesiastical Judge,
* 759 * the parishioners had been convened by a notice on the 15th of July, for the purpose of making a rate ; in other words, to ascertain and assess the amount which had become necessary for each parishioner rateably, according to the annual value of his rateable property, to contribute, in order to raise a fund adequate to the purposes mentioned in the notice. A rate of 2s. was proposed and seconded. The majority thereupon refused to vote upon that question, and, under colour of moving and carrying an amendment, preferred to express their sentiments

on a matter inconsistent with the object of the meeting, and refused to concur in making a rate. "Suppose," said the Judges of the Queen's Bench, in their well-considered judgment delivered in this case on the 8th of February, 1847, "twenty were convened to do an act which the law required them to do at that time, and the only open question was the mode of doing it; a mode lawful in itself is regularly submitted, whereupon fifteen declare that although the law has imposed the duty on them, they entertain so strong an objection, on grounds of conscience, to the law, that they refuse entirely to concur in obeying it. What must be the consequence? Must the law be set at naught, and its requirements be disregarded? Or must not those who stand aloof be considered as refusing to assist in the execution of their duty, and leaving it to be done by a minority which is desirous of doing what is right?" In the present case the parishioners had assembled, in obedience to the monition of a Court of competent jurisdiction, for the purpose of making a rate. The majority of that assembly refused to take a part in the proceedings necessary for making it. They did not say that the church was in repair, nor that 1s. or any other sum should be assessed, but abstained from voting upon the only open question, and in the making of any rate refused altogether to act. The opinion expressed by * me in the Court of Exchequer Chamber, that their * 760 refusal to act at the meeting for the purposes for which alone the meeting had been convened, was equivalent to a refusal to attend, remains unchanged. In fact, the majority of the rated inhabitants, assembled to carry into effect the purposes of the monition and the notice, did make the rate:

Upon the whole, therefore, I answer to the first of the three questions, that, in my judgment, the present record does not show the rate sought to be enforced to be an invalid rate.

To the second, that such rate does appear to be a valid rate.

And to the third, that in the circumstances apparent upon the record, prohibition does not lie against the enforcement of the said rate; but that a writ of consultation should be awarded.

MR. JUSTICE MAULE.—Having given an opinion on this case in the Court of Exchequer Chamber, which is in print, and has been referred to in the argument at the bar of the House, and retaining the opinion then expressed, for the reasons then given, it is not

necessary that I should at any length trouble your Lordships with a repetition of my reasons on this occasion, and I shall therefore state them briefly.

As to the first and second questions, I am of opinion that the rate sought to be enforced is not an invalid rate, inasmuch as I think that it appears to be a valid rate, having been made by persons competent to make a rate, assembled on an occasion on which the duty of the assembly was simply to make a rate, and on which those who chose to take no part in making a rate, but showed themselves to be determined not to entertain any question as to the mode in which it should be made, are to be considered

* 761 * as absent, and their refusal to concur, and their protest, to be null and void.

As to the third question, thinking the rate to be good, I think that prohibition does not lie.

MR. JUSTICE COLERIDGE. — I humbly offer my opinion that the first of these questions should be answered in the negative, and the second in the affirmative ; and as my reasons for thinking that the rate appears on the record to be valid will include all I could say to establish that the record does not show it to be invalid, I thus answer the questions together, and will proceed to state my reasons for coming to these conclusions. But the case before the House, on which these questions have been put to the Judges, has been so repeatedly argued, and so many elaborate judgments have been pronounced on it, of all which your Lordships are in possession (judgments, I may say, which appear to me, and I believe to your Lordships, to have exhausted the subject, to which at least I feel that I can add nothing worthy of your attention), that the reasons which I shall venture to offer will be few and simple, and I hope shortly stated. I understand the questions to be framed with a view to the consideration of two points raised by the parties in error. First, they say the rate is bad because it was not made by the numerical majority of the parishioners assembled in vestry, but by the minority. Secondly, even if under the circumstances that minority is to be considered as the legal majority, or rather as the whole number of persons taking part in the proceedings of the vestry, it does not appear that the rate was made by the majority of that minority. I regret that this second point, which was not earnestly pressed in the Courts below, should have been

insisted on in the argument before the House, because it is in the * nature of a special demurrer, and calculated only * 762 to avoid a decision of the really important question which the cause raises; but looking at it first in point of form, it seems to me free from difficulty, if I assume, as I am entitled to do, in this part of the argument, that a rate might well be made, under the circumstances stated, by the larger part of the numerical minority; for it will then appear on the record that the numerical majority having been disposed of by what is stated to have previously occurred, the rate was made in the usual way, "by the vicar, church-wardens, and others of the parishioners and rate payers then and there present." And I take that rate to appear to be valid to which, under the circumstances stated on the record, there is no available objection. Now I desire to adopt here the argument used by Lord Cranworth and my brother Parke in the Court below in discussing this point, that the prohibition being applied for after sentence, the invalidity relied on must appear on the face of the proceedings. Nothing here appears to show, on the assumption above mentioned, that the rate may not be perfectly free from the objection surmised; but, coming to the substance, the state of the case appears to me accurately described in the judgment of my brother Maule in the Court below: "The greater number of persons present at the vestry refused to make any rate, and proclaimed to all others their refusal to do so, grounding their refusal on reasons which showed that their determination was to refuse in any manner to concur in enforcing by compulsory means the repair of the church, and that thereupon a rate was made with the concurrence of all present, except those who were determined not to make any rate whatever." Now, conceiving that the record in substance discloses this state of things, although I admit that a more formal course might have been pursued, I think the added form would have conduced nothing * to the validity of the proceedings. I am not aware that * 763 at assemblies of the nature of a parish vestry, and constituted as parish vestries usually are, it has ever been held necessary that any precise form of proceeding should be pursued. It would be very mischievous if it should be so held. If the questions for decision are fairly and intelligibly stated, if every one present and desirous of making a proposition has an opportunity of doing so, if every one desirous of giving a vote has an oppor-

tunity of doing so on every question proposed, all has been done in these respects which is necessary. And this was amply done here. To what avail, except by way of provocation, would it have been to repeat the original proposition of a 2s. rate to those who had already voted against it in voting against all rates? How could it be necessary to call to that precise amount the attention of those who had already declared themselves, in a formal resolution, "bound by the highest obligations of social justice and of religious principle to refuse to make a rate" for a farthing? Moreover, it has always seemed to me that the vicar would have acted more correctly if he had not treated the illegal proposition, which the majority voted for, as an amendment at all. He ought not to have put such a proposition to the meeting. It was *nihil ad rem*. It only disclosed that those who put it forward, and those who supported it, had come to the meeting determined not to take any part in discharging the duty for which alone they were brought together. Of course if there was no amendment moved, and that after a specific challenge to move one, or to make any proposition as to the amount of the rate, there was no necessity for again putting the original motion. On all these grounds it seems to me clear that the present record does not show the rate in question to be an invalid rate.

I pass, then, to the consideration of the second question,
* 764 * and, in answering this in the affirmative, I still adhere to the reasons on which we decided the case originally in the Court of Queen's Bench. The rule of law as applicable to corporators and electors, where they are assembled as such, with a duty cast on them to do some particular act or make some election, I do not understand to be in itself disputed; but it is denied that these cases are analogous to the present. It is said that in these cases there is no alternative, nothing can be substituted for that which the law requires, and that which the law requires must then and there be done, but that in this, the vestry assembles to make a by-law, and is a deliberative body; even if it must repair the church, it may choose the mode and measure of repair. It is unnecessary to discuss whether the making a rate is the making of a by-law. I confess I still think, after full consideration of the high authorities by whom the term is used, and with the greatest respect for those who now adopt it, that it is not a very well chosen one, and does not very happily represent the thing here signified

by it. But of course I do not question that, generally speaking, in providing for the repairs of the church, the vestrymen have a discretion to exercise, and are a deliberative body. Still, if in this case, and under the circumstances which existed, they were bound to make a rate, and only a rate, the leading point on which the analogy rests is made out. And I think they were ; so that if the rate when made was a by-law, it differed in this respect from most other by-laws, that it was one which the makers could not but make, unless they failed in the discharge of their duty, and must make in the terms proposed. The vestry was assembled under a monition to meet and make a rate ; but I will not rely on the circumstance of the monition ; either its language or its binding nature. I will assume that the vestrymen had met in consequence of an ordinary summons *under ordinary cir- *765 cumstances. Three matters would then in succession have come before them : the necessity for repair, the estimated expense, and the mode of providing it. Upon the first two they might have deliberated ; and if they had determined that no repairs were necessary, no duty would upon this ground have arisen under the third head ; or if they had rejected the estimate, admitting the necessity for some repairs, the duty under the third head would have been postponed until they had agreed on the estimate. But on this record no dispute appears as to the necessity for the repairs, nor any objection to the amount of the estimate. The record sets out the minute of the proceedings, and the fair intendment from it is to the contrary. I have a right, therefore, to treat the vestrymen, one and all, as admitting these two points, or rather as having decided them in the affirmative ; as saying, We find the church needs repairs, the expense of doing which has been estimated at a reasonable sum. Having got thus far, it will not be disputed that they could not, without infraction of the law, refuse to find the necessary means of doing the repairs estimated for.

I state it on purpose thus generally. But what are the necessary means for doing repairs according to estimate, which means are not to be voluntarily contributed by one or more as they please, but which are to be rateably and compulsorily levied on all parties by law liable, the nonpayment of which may be enforced by legal proceeding ? Can they be any thing but money ? In all the arguments which this suit has occasioned, has any one case

been cited in which, I will not say any other means have been decided to be available, but in which any other have even been contended for in argument? Would it be possible for any assessment

so to apportion the contribution of materials, skill, or labour

* 766 among the parishioners, as to arrive at *any thing approaching to equality, which is of the very essence of all rating? In every parish there must among the parties liable be aged; infirm; women; some who could not labour; many, perhaps the greater part, who have no skill; many who have no materials; many whose quota would be so small as, in the shape of a separate contribution in kind, to be wholly useless. By law the church-wardens, not the aggregate parishioners, are to do the repairs. Can any thing be conceived more absurd than the notion of their attempting this by means of such an assessment in kind as can alone be suggested if a money rate be put out of consideration? But it must be remembered that other things beside the repairs of the fabric are by law cast on the parishioners. Other things were required and estimated for on the occasion in hand, as appears by this record; namely, "the providing necessaries for the decent celebration of divine service, and officers therein." How, I would ask, could this object have been accomplished by a rateable and compulsory contribution, except in money? Let me take, by way of example, one of most frequent occurrence, the provision of the elements for the celebration of the holy communion. The mode of providing these, it is well known, has been varied more than once since the Reformation. The kind of bread, and form of it, are so connected with important and much-questioned doctrine, as naturally to have given rise to many scruples, which rubrics have been made from time to time to prevent. By law now, the bread and wine must be provided by the curate and church-wardens, at the charges of the parish. Must not this of necessity be by money rate? This is one instance; but if all the particulars included under this head of necessaries for decent celebration were gone through, it would be found, I believe, that the same necessity existed nearly in all. Now this, in the present instance, formed but a part, and a small

* 767 * part, of the whole for which the rate was required. It might have been, and no doubt in many instances is the whole. Could then, in this instance, the vestry have made two assessments, one in kind for the repairs, one in money for the neces-

saries ? Has the vestry an option as to the former, the repairs, and none as to the latter, the necessaries ? Or shall we come fairly to the conclusion which all practice, all convenience, and all reason sanction, and against which no precedent, no decision has been produced ?

If, then, the vestry had no option but to impose and assess a money rate, what is to be the consequence of their refusal to do their duty ? The answer, as I understand, is, that before the Reformation, excommunication and interdict were the appropriate and sufficient remedies ; that these have either passed away or become inefficient, and that so, incidentally, there is now no remedy. It is probable, and I dare say true, that, in the case of obstinate individuals or parishes, these penalties may have been formerly imposed, or even that the threat of them may have sufficed to procure obedience to the law ; but I would observe that, even then, there would have been intolerable injustice in depriving the minority of the parishioners of the enjoyment of all religious rites, on account of the obstinacy or irreligion of the majority. It must not, therefore, be conceded that, even formerly, the minority might not have done by law what the minority has done now ; that is, taken the necessary steps for procuring obedience to the law. But supposing this remedy never put in practice before the Reformation, because the necessity did not arise, and that no case since the Reformation can be found, but that of *Gaudern v. Silby*,¹ to show that it might be had recourse to (though in passing, let me observe that that case, whether well or ill decided, is at least important evidence * to show that, in point of fact, rates made, * 768 as in that case the rate was undoubtedly made, were not wholly novel and unprecedented), yet even these suppositions are by no means conclusive that the remedy has not existed, or does not exist. There must have been factious and recusant corporators long before Lord Mansfield presided in the Court of Queen's Bench. In the earliest of the cases which came before him, and to which he applied the now established rule, all which is now urged might have been said as to its being unheard of and unprecedented, and without analogy to support it ; it might have been said then, with greater force than now, but he would certainly have disregarded such an argument. I believe I am well founded in saying, that when you find a breach of the common law producing an

¹ 3 Curteis, 272.

injury to third persons, and there is a principle, resting on reason and justice, in harmony with the principles of that law, and conflicting with none of its established rules, the application of which will furnish a remedy, you may take it that the common law adopts that principle, and makes it a part of its own code. So it is, unquestionably, as a fact, that a great part of the common law has been gradually built up, and you can find no other foundation for it. In every instance of such accretions, if I may so call them, there must have been a first decision, without any judicial precedent or statutory authority. On this principle, so guarded, it is really of the greatest practical importance to let no doubt or discredit be thrown. If you disparage it, you not only sap the foundation of much that is now established on satisfactory grounds, but you deprive the common law of an expansive power, to which it owes, more perhaps than to any thing else, its high character and great utility ; a power which may in some degree be its set off against the more enlarged range and scientific divisions of the Roman law.

*769 * On these grounds I feel little impressed by the argument drawn from interdict and excommunication. They may have been at one time the appropriate and sufficient remedies for the refusal to repair the fabric of the parish church, but still that also, which is now relied on by the defendant in error, may have been coexistent in power, though not called into action because there was no necessity requiring it. If this be a difficult supposition to make, we have only our choice of difficulties. The plaintiffs in error must contend, not only that there is no existing remedy to enforce an important, indisputable, and now undoubted legal obligation, — a proposition which the common law will not lightly admit, — but also that a great many of the parishioners desirous of doing their duty toward the church may be, by the neglect and contumacy of their neighbours, deprived of the use of their church, of the administration of the sacraments, of the celebration of divine services, and yet have no remedy whatever. This is neither an imaginary case nor an exaggerated statement. If there should be novelty in the legal principle on which I stand, there is at least equal novelty, to an English lawyer, attended with gross injustice, in the principle relied on by the plaintiffs in error.

The whole may be very shortly stated. The parishioners, when

they assembled in vestry, were there not as individuals only, but clothed with a special character, having a prescribed duty and a definite purpose ; and on those accounts only, armed with special powers ; were they many or few, rich or poor, they might bind the whole parish by a resolution within the scope of their purpose and in discharge of their duty. The purpose and the duty were to provide pecuniary means, to be placed at the disposal of the church-wardens, for repairing the church, if on consideration they, the vestry, should find it needed repair. This they were * to inquire into ; and they were to consider, further, * 770 the reasonableness of the amount which the church-wardens should allege to be necessary for the repairs. When they had made these two inquiries, and were satisfied, they could not refuse to do the third and principal act without breaking the law,— divesting themselves of their powers,— abdicating their functions,— ceasing to be vestrymen. They did not, because they were still in the vestry-room, remain a dissenting majority of the assembly, for they had renounced, as irreligious and against conscience, the definite purpose for which alone the assembly was convened. Refusing to obey the law, because they thought it unrighteous, they might decline to act in their special character ; but they could not prevent others, whose conscience was either more or less enlightened, from discharging what they thought their duty. They did not, indeed, personally withdraw, nor did they in express terms decline to vote on the question before the vestry ; but their acts, by necessary and unequivocal implication, amounted to this. They could not attend merely for the purpose of illegal obstruction. This view has been represented as unreal and artificial. It seems to me to be as simple and matter-of-fact a conclusion of common sense and justice as can well be imagined. On these grounds, and without again travelling through the various authorities so well considered in preceding judgments, I humbly offer my opinion to your Lordships, that the second question ought to be answered in the affirmative.

And in answer to the third question, I am of opinion, for the reasons already given, that a prohibition does not lie against the enforcement of the rate under the circumstances apparent upon the record.

MR. BARON PARKE.— My Lords,— In answer to the questions

*771 proposed by your Lordships in this case, I have to say that, in my * opinion, the answer to the first question should be in the affirmative, and that the second and third questions should be answered in the negative.

Having given my reasons fully in the Court of Exchequer Chamber, when the case was argued and decided in the Court below,¹ I think it is unnecessary to do more now than to say that it appears to me that no rate is valid unless it is made with the concurrence of the majority of those actually present, and that the unanimous concurrence of the majority is just as necessary as the unanimous concurrence of all in a definite body where the law requires it.

1853. August 12.

LORD TRURO. — This case comes before the House upon a writ of error, brought upon a judgment of the Exchequer Chamber, affirming a judgment of the Court of Queen's Bench upon demurrer to a declaration in prohibition.

The question raised by the demurrer was, whether the Court of Arches of London was exceeding its jurisdiction in proceeding to enforce the payment of a certain church rate set forth in the libel.

The libel was originally exhibited in the Consistorial and Episcopal Court of London, by the church-wardens of the parish of Braintree, in the county of Essex ; and the libel prayed that the plaintiff in prohibition might be condemned to pay a certain sum assessed upon him by an alleged church rate, made by the vestry of that parish. The admission of the libel was opposed, on the ground that the alleged church rate had not been made by a competent authority ; that is, that it had not been made by a majority of the inhabitants of the parish, duly assembled in vestry, and that therefore the Court had no jurisdiction to enforce the payment.

*772 * The Judge of the Consistorial Court held the rate to be invalid, and refused to admit the libel.

Against that decision the church-wardens appealed to the Court of Arches, and the Judge of that Court held the rate to be valid, and reversed the previous decision, and admitted the libel. The plaintiff thereupon applied to the Court of Queen's Bench for a writ of prohibition ; and after discussion, the plaintiff was directed to declare in prohibition, which he did, and the defendant demurred

¹ 12 Q. B. 388.

to the declaration. After argument of the demurrer, the Court held the rate to be valid, and gave judgment for the defendant. A writ of error was then brought in the Exchequer Chamber, and that Court affirmed the judgment, whereupon the plaintiff brought his writ of error in Parliament, which is now standing for the judgment of this House.

As the case may much depend upon the construction of the libel in regard to the person by whom the rate in question was made, it is essential that the contents and effect of the libel should be accurately presented to the attention of the House.

The declaration in prohibition sets forth the libel, from which it appears that a prohibition had been granted to stay proceedings in the Ecclesiastical Court, which had been adopted to enforce the payment of a church rate, made by the church-wardens in 1841. That a monition was afterwards issued, at the instance of the vicar, commanding the church-wardens to summon a vestry, and commanding the inhabitants, when assembled, to make a rate for the necessary repairs of the church. That a vestry was accordingly duly summoned, and held on the 15th July, 1841, for the purpose of making a church rate. That at such vestry the church-wardens produced surveys and estimates, showing the amount necessary to be raised by a rate to repair the church and provide for the celebration of public worship; and that the vicar having then taken the chair, the church-wardens *proposed that a rate * 773 of 2s. in the pound should be made, whereupon an amendment was moved, and carried by a great majority, to the effect that, for certain irrelevant reasons, the vestry should refuse to make a rate.

The irrelevant reasons referred to, which were assigned in the amendment so moved, were to this effect: "That all compulsory payments for the support of the religious services of any sect, or people, appears to the majority of this vestry to be unsanctioned by any portion of the New Testament Scriptures, and altogether opposed to and subversive of the pure and spiritual character of the religion of Christ." The amendment then goes on to say that it is unjust for one religious sect to compel others which disapprove of its forms of worship or system of church government to contribute to its support. And it concludes by saying: "This vestry feels bound, by the highest obligations of social justice and religious principle, to refuse to make a rate, and does refuse

accordingly." The libel then proceeds to state, that after such amendment was carried, and the rate refused, and no affirmative answer returned to the question whether there was any other proposition as to the amount of the rate, the church-wardens and others of the rate payers and parishioners then present did, in obedience to the monition, rate and tax the inhabitants and parishioners liable to contribute to a church rate, &c. the several sums of money mentioned in the rate, being an assessment of 2s. in the pound on the annual value of rateable occupation ; and that a rate of 2s. in the pound was then produced, made, and signed by the vicar and church-wardens, and other of the parishioners and rate payers then present. The libel then sets forth the defendant's liability, assessment, and nonpayment, and prays that he may be condemned to pay the sum assessed upon him, and the costs. The libel then states, that the proponent produced the rate in question, and deposited the same in the registry of the Court.

* 774 * The libel then contains the following passage : "That in part supply of the proof of the premises in the libel pleaded, and to all other intents and purposes in the law, the proponent did exhibit, and to the libel annex, and pray to be there read and inserted, and taken as part and parcel thereof, certain papers, and among them a certain writing, propounded to be a true copy of the entry of the proceedings of the vestry of the 15th July, 1841, at which the rate in question was made, such proceedings being entered in the vestry book by the acting vestry clerk, with the privy and concurrence of the vicar, who was chairman. And such paper writing, after setting forth the prior proceedings of the vestry, contains the following statement in relation to the making of the rate: 'Mr. Veley then proposed on behalf of himself and Mr. Joslin, addressing himself to those rate payers who were willing to obey the monition, that a rate of 2s. in the pound should be made by them, and a rate of 2s. in the pound is produced and signed by the vicar, the two church-wardens, and several rate payers present. Mr. S. Courtauld, as the mover of the amendment, protested on his own behalf, and on behalf of the meeting, against the irregularity and impropriety of the church-wardens attempting to make a rate after it had been refused by a large majority of the vestry, and protested also against the rate so attempted to be made. B. Scale, Vicar ; A. C. Veley, Thomas

Joslin, church-wardens ; Samuel Courtauld, E. G. Craig, parishioners.' " Such are the material parts of the libel.

The case was ably argued at the bar, and after the argument your Lordships were pleased to put the following questions to the Judges who had attended during the argument : —

1st. Does the present record show the rate sought to be enforced to be an invalid rate ?

2d. Does such rate appear to be a valid rate ?

* 3d. Does prohibition lie against the enforcement of the * 775 said rate in the circumstances apparent on the record ?

In answer to your Lordships' questions four of the learned Judges, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Baron Platt, and Mr. Justice Wightman, have expressed their opinions to be that the libel set forth a valid rate.

MR. JUSTICE TALFOURD expressed an opinion that the rate set forth did not appear to be an invalid rate, nor did it appear to be a valid rate ; and that the prohibition ought not to go, inasmuch as the application for it was made after sentence.

Other five of the learned Judges, Mr. Justice Crompton, Mr. Baron Martin, Mr. Justice Erle, Mr. Justice Williams, and Mr. Baron Parke, stated their opinions to be that the rate set forth in the libel appeared to be an invalid rate.

Upon referring to the opinions which have been delivered by the respective Judges, it will be seen that the Judges are unanimously of opinion that a valid church rate can only be made by an actual or constructive majority of the parishioners in vestry assembled. Secondly. That if it appears upon the face of the libel that it was not so made, prohibition ought to be granted. Thirdly. The great majority of the Judges are of opinion that prohibition ought to be granted, unless it appears affirmatively that it was so made ; but some of the Judges are of opinion that prohibition ought not to go unless it appears affirmatively not to have been so made ; and those Judges found their opinion upon the assumption that sentence had been pronounced in the Court below, before the prohibition was moved for, and therefore, according to the rule which prevails in regard to prohibition moved after sentence, prohibition ought not to be granted unless the want of jurisdiction

* appears affirmatively upon the face of the libel ; in other words, unless it appears to have been made by an incompetent authority.

It is obvious, therefore, that it is necessary to ascertain what is the correct import of the libel in regard to the persons by whom the rate was made. The libel, after setting forth the proceedings of the vestry up to and including the carrying of the amendment by which the vestry refused to make a rate, proceeds in the following manner : " That the majority of the vestry having refused to furnish the necessary funds, the church-wardens and others of the rate payers and parishioners then present in vestry did, in obedience to the monition, at the vestry, and while the parishioners so continued in vestry assembled, rate and tax the inhabitants and parishioners liable to contribute for and towards, &c. the several sums of money mentioned in the rate, being a rate of 2s. in the pound on the annual value of, &c. ; and that accordingly a rate of 2s. in the pound was then and there produced, made, and signed by the vicar, church-wardens, and others of the parishioners then present." The libel then sets out the rate deposited in Court.

The rate commences with the following heading or title : " We, the church-wardens and other parishioners of the parish of Braintree, whose names are hereunto subscribed, do hereby, in pursuance of and in obedience to a monition, &c., rate and tax all and every the inhabitants and parishioners of the parish of Braintree liable to contribute, &c. for and towards the necessary repairs of the church, and for and towards providing, &c. the several sums of money hereinafter mentioned, being a rate or assessment of 2s. in the pound, upon the annual value of all rateable property occupied within the parish." Then follows the name of the parishioners

rated, the property in respect of which they are rated, and

*777 the amount assessed upon them respectively ; * and the rate

purports to be signed at the foot by the vicar, church-wardens, and eighteen rate payers.

It will have been observed that the libel in the defendant's case states that the church-wardens and others of the rate payers present in vestry rated and taxed the inhabitants, and accordingly signed the rate produced.

The entry of the proceedings of the vestry, as likewise set forth in the defendant's case, states that Mr. Veley proposed, on behalf of himself and Mr. Joslin, addressing himself to those rate payers who were willing to obey the monition, that a rate of 2s. in the pound should be made by them ; and that a rate of 2s. in the pound was produced and signed by the vicar, the two church-

wardens, and several rate payers present, the mover of the amendment protesting, on behalf of the meeting, against the rate so attempted to be made.

Very different constructions have been put upon these statements in the libel in regard to the persons by whom the rate was made. The Judge of the Consistory Court held the libel to import that the rate was made according to its title; that is, by the church-wardens and the eighteen parishioners who signed the rate. The Dean of the Arches construed the libel to mean that the rate had been made by the church-wardens. The majority of the Judges inferred that the rate had been made by the minority of those who voted against the amendment, or the majority of such minority. Mr. Justice Talfourd held, that the libel did not furnish the means of determining by whom the rate was made.

The allegation in the libel that the rate was made and signed by the vicar, church-wardens, and others of the parishioners and rate payers then present, is very general. The entry of the proceedings is somewhat less general, as that states that the church-warden, addressing himself to * the rate payers who * 778 were willing to obey the monition, proposed that the rate should be made by them, and that the rate was produced and signed by the vicar, the two church-wardens, and several rate payers present. The rate itself is definite, as the heading or title to it states that the rate was made by the church-wardens and eighteen parishioners, who signed the rate.

The rate itself, thus expressly declaring by whom it was made, would appear to be the best evidence upon the subject, and it is expressly referred to in the libel, and prayed to be accepted as the proof of the allegation in the libel. The construction of the Judges would seem to be founded more upon the language of the allegation in the libel than upon the proof referred to. And it certainly is a strong construction, when the rate, upon its face, states it to have been made by the church-wardens and eighteen parishioners, who signed it, to hold that that imports the rate to have been made by the whole minority of the vestry. Neither does the entry of the proceedings seem very consistent with such construction, inasmuch as that states the rate to be made by the vicar, the two church-wardens, and several rate payers present, they not being described as even constituting the body of rate payers willing to

obey the monition. The entire absence of any statement importing that the negative of the proposed rate was put in any form or to any portion or section of the vestry, however composed, is material.

The argument urged at the bar, and adopted by some of the Judges, in support of the construction that the rate was made with the unanimous concurrence of the minority who voted against the amendment, has been mainly founded upon the assumption that all the details, by which the amount of the rate would be regulated, had been assented to by the vestry, and that therefore *779 the amount of the rate * followed as of course, and that the only question the vestry had to consider was, rate or no rate.

The details by which the amount of the rate required would be governed were, the extent of the repair required by the church, the necessary cost of such repair, the number of persons who ought to be omitted from the rate by reason of poverty, the amount necessary to defray the expenses incident to public worship, and whether the required amount should be raised by one or more rates.

The only statement contained in the libel as to these details is, that a survey and estimate respecting the repair required by the church, and the necessary cost of the repair, and an estimate of the incidental expenses, was produced, and that a number of persons, whose rates would amount to 1000*l.*, were omitted from the rate by reason of their poverty. But not a word is to be found importing that any of the documents were read, or that the contents were stated, or that they were the subject of attention by the vestry, or any one parishioner, or that a single sentence was uttered concerning them.

From the single statement that these documents were produced, the unanimous assent of this otherwise discordant vestry is assumed to details so open to question and difference of opinion, and this assumption is the foundation for some of the most important arguments in support of the rate; and the assumption is made without adverting, in the slightest degree, to many circumstances which strongly repel the inference that the absence of objection to those details, or remarks upon them, ought to be referred to an acquiescence in them by the entire vestry.

Remembering that it appears upon the record that a rate was

refused by the vestry in 1837, and remembering also the irritating and expensive litigation which had since prevailed * in this parish respecting the power by which a church * 780 rate can be made, it is obvious that the parishioners came to the vestry in anticipation of a severe conflict upon that question, and it does not appear that a word was said upon any other subject. That question appears to have been the exclusive and absorbing subject of attention. And yet the validity of the rate is supported upon the footing of its having been made by the whole minority who voted against the amendment, upon the ground of an assumed acquiescence in the details, which details do not appear to have been the subject of attention or remark.

It is quite apparent that the vestry was assembled with the express view of raising the question whether any portion of the vestry could, in opposition to the majority, make a valid church rate. And therefore, the admitted uncertainty of the libel relating to the manner of making the rate is remarkable, and can scarcely be referred to negligence or inadvertence. Nothing could have been more simple than a statement that the rate had been adopted by a vote of the minority who were willing to concur in making a rate, if the fact had warranted so plain a statement; and the rate itself would, no doubt, have testified to its being made by the whole minority, if such had been the fact. Whereas, as before stated, the memorandum upon the rate shows it to have been made by the eighteen parishioners who signed it at the time, and the church-wardens.

The uncertainty in regard to the persons by whom the rate was made is to be much regretted, because, in the event of the judgment being affirmed, it is calculated, in connection with the opinion of the Judges, to continue the parish involved in litigation. The construction upon which the Judges have founded their opinion of the validity of the rate being that it was made by the minority or a majority of it, it follows that, in the event of the cause below proceeding, * and the evidence establishing that the rate was not made according to the construction of the Judge of the Consistory Court, or that of the Dean of the Arches, the opinion of the Judges will be an authority in favour of the plaintiff's right to a prohibition against enforcing a rate so made. In my opinion, the result of the evidence referred to in the libel shows that the rate was made according to the state-

ment in the heading or title of the rate itself,—that is, by the vicar, the church-wardens, and eighteen parishioners who signed it, and that it never was put to the vote of any portion or section of the vestry whatever, and that no opportunity whatever was offered to any one to express a negative of such a rate.

Regard being had to the established rule of law, that no rate, tax, or pecuniary burthen can be enforced, unless the legal authority to make such rate, or impose such burthen, is clearly shown, it may excite surprise that this admitted uncertainty of the authority by which the rate was made has not created more difficulty in affirming its validity. Supposing the libel does not show a rate made by the majority of the vestry, actual or constructive, according to the opinion of the great majority of the Judges, it is invalid, and the Court below ought to be prohibited from proceeding to enforce the payment.

There are some preliminary points which seem to call for observation, before I submit the view I entertain upon the leading questions of the case. I would notice, first, that the Ecclesiastical Court is one which is bound to show jurisdiction upon the face of its proceedings, except that a party who shall have acquiesced in the jurisdiction, and been content to rely for success upon the merits, is not allowed, after an adverse decision upon the merits, to move for prohibition, unless he can show an absence of jurisdiction upon the face of the proceedings.

* 782 * In Bacon's Abridgment, tit. Courts, D., p. 392, it is said, "That the Ecclesiastical Court is an inferior Court, subject to the control of the King's Temporal Courts when it exceeds its jurisdiction; and is bound and circumscribed by certain laws and stated rules, to which, in all their pleadings and judicial determinations, they must square themselves." Again, D. 4, pl. 4, p. 396, it is said, "Inferior Courts are bounded in their original creation to causes within such limited jurisdiction; hence it is necessary for them to set forth their authority, for, as hath been clearly observed, nothing shall be intended within the jurisdiction of an inferior Court but what is expressly alleged to be so."

In the notes to the case of *Peacock v. Bell*,¹ it is stated, with reference to this point, that, "in actions in inferior Courts, it is necessary that every part of that which is the gist and sub-

¹ 1 Wms. Saund. 74 a, note 1.

stance of the action should appear to be within their jurisdiction."

Whether jurisdiction is shown upon the libel in this case depends upon the question whether the rate is shown to be a valid rate; in other words, whether it appears to have been made by a majority of the vestry legally constituted.

Further, in consequence of the remarks of some of the Judges, it is material to observe, that the authorities show that, by the law and practice of the Ecclesiastical Courts, every libel or allegation must set forth not only averments but facts, which, if proved, will entitle the party to the relief sought for. The libel in this case had been rejected by the experienced Judge of the Consistory Court, upon the ground that the libel showed that the rate had been made by the church-wardens and eighteen parishioners who signed, and not by the majority of the vestry, and that therefore it showed an invalid rate, of which the Court had no jurisdiction * to enforce the payment. Upon appeal, the * 783 Dean of the Arches reversed this decision, and admitted the libel to proof, upon the ground that the libel imported that the rate had been made by the church-wardens, and that, under the circumstances which had occurred, the church-wardens were legally competent to make a rate.

The law is very clearly stated, regarding what is requisite in the pleadings in the Ecclesiastical Court, by Sir John Nichol, in the case of *Montefiore v. Montefiore*,¹ and is adopted and acted upon by Dr. Lushington in the case of *Neeld v. Neeld*.²

The case of *Montefiore v. Montefiore* arose upon a question of the admissibility of the allegation propounding a will, and the learned Judge expressed himself to the following effect: "The cause must proceed, indeed, should the Court admit the allegation, in order to this being proved: as it only assumes an allegation to be true for the purpose of determining whether it be admissible, its final avail and efficacy, in the cause, obviously depending upon whether, and to what extent, the allegation is proved, after being so admitted. In assuming, however, an allegation to be true for the purpose of determining its admissibility, the Court only assumes to be true those facts pleaded in it capable of satisfactory proof; and not, by any means, all the several averments which may stand in the allegation, which in effect are mere inferences

¹ 2 Addams, 354.

² 4 Hagg. 263.

deduced somehow or other from those facts. The averments in a plea are to be taken for true, so far only as the facts pleaded justify inferences to the effect of those averments; which, whether they do at all, and, if so, to what extent, it is for the Court to determine. For instance, in this sort of allegation, 'intention' on

the testator's part to do so and so is always averred, but

* 784 such averment goes for * nothing, unless the Court can infer that the testator's intention was as averred, from the facts pleaded. So when again, in a plea of this same description, the testator's capacity at the time of doing the testamentary act is averred, as it always is, the truth of that averment is only assumed by the Court, even in deciding upon the admissibility of the plea, to what extent it thinks that the facts and circumstances of the transaction, as pleaded, warrant an inference that he was of capacity at such time; and so in other matters. * * * The Court being of opinion that all the circumstances pleaded in the allegation will not be sufficient, if proved, to sustain the paper propounded, rejects the allegation."

In *Neeld v. Neeld*, the question also arose upon the admissibility of the libel. The object of the suit was to obtain a divorce for alleged cruelty; and in the judgment of Dr. Lushington, it is said, "that the admissibility of a libel depends upon the solution of the question, whether the facts, as set forth, which are to be taken as true, would prove cruelty. The only question is, whether the charges laid in the libel are sufficient to justify me in eventually admitting it to proof. * * * It has been said that the libel must be taken, for the purpose of argument, as true. To that position I entirely accede when rightly understood. This principle, however, does not go the length of supposing every syllable stated to be true. Averments distinctly pleaded as facts must be assumed to be proved, while averments of an inferential and argumentative character are to be taken only as true to the extent that the inferences themselves can be fairly drawn from the circumstances pleaded as facts. I am bound to form my judgment upon the libel and exhibits." In that case the libel was rejected.

In *Clowes v. Clowes*,¹ the law is recognised that a libel * 785 * which does not state a case which, if proved, will entitle the prosecutor to a sentence, ought not to be admitted. The

¹ 3 Curteis, 185.

books of authority, Ayliffe's Parergon, Oughton, and Conset, state the rule to the same effect.

There is no doubt that, if either of the Judges of the Ecclesiastical Court had considered the libel as so uncertain and general as it would seem to be, from the variety of constructions that have been put upon its import, it would have been rejected upon that ground, the law of that Court requiring the facts to be stated with that degree of distinctness and certainty which will apprise the defendant of the evidence intended to be given, in order that he may be in a condition to cross-examine the witnesses, or to repel or contradict the evidence, if untrue; and as the evidence in support of the libel is not disclosed until after the opportunity to cross-examine and to give evidence in opposition to it has passed, it is obvious that, except for the protection afforded by the rule of law referred to, a defendant could be subjected to great surprise, and be without the notice necessary to enable him to defend himself. But each of the Ecclesiastical Judges held the libel to be ambiguous; that is, one holding it to import the rate to have been made by the parties who signed it, and the other that it was made by the church-wardens; the Judges differing from both, — one Judge being unable to collect any distinct meaning from it, and the others being uncertain whether it was made by the minority or a majority of such vestry.

The third question put to the Judges, viz. "Does prohibition lie against the enforcement of the said rate in the circumstances apparent upon the record?" seems to have referred to the point which had been raised, whether sentence has been pronounced in the Court below, within the meaning of the rule which requires a plaintiff in prohibition to establish an absence of jurisdiction apparent upon the face of the proceedings.

* It is quite clear, when attention is paid to the state of * 786 the proceedings in the Ecclesiastical Court, at the time the motion was made for the prohibition, that there is no foundation whatever for the assumption, that any sentence has been pronounced, within the meaning of the rule referred to.

The monition issues at the instance of the party without the intervention of the Court, and, after appearance, it is the duty of the proponent or plaintiff to exhibit a libel, and to apply to the Court that it may be admitted or received; and until the libel is admitted, the Court has no cognizance of the cause. It is com-

petent to the defendant to oppose the admission upon various grounds, and among them, that the libel does not state facts which, if proved, will entitle the proponent to the sentence he prays, or that it states extraneous matter, or that the facts do not show a case within the jurisdiction of the Court. If the Judge admits the libel, the cause is then in Court, and the defendant may either rely upon the proponent failing to prove his case, or he may make an allegation by way of defence, and may give evidence on his own part. When the evidence is complete, the case is heard, and the defendant upon the hearing may again contend that the Court has no jurisdiction either over the subject matter or over the person, or that the case is not brought within the jurisdiction, or that the evidence does not support the libel ; sentence is pronounced after hearing the advocates.

Such being the course of proceeding in the present case, the defendant below, the now plaintiff, opposed the admission of the libel in the Consistory Court, upon the ground that the libel did not show a church rate made by competent authority, and that the Court, therefore, had no jurisdiction to impose the payment. The Judge of that Court held the objection valid, and rejected the

libel. That decision, upon appeal to the Dean of the
* 787 Arches, was reversed, and the * libel admitted, whereupon the plaintiff moved for the prohibition.

The admission of the libel decided nothing more than that the Court would entertain the suit, the defendant being, as before stated, at full liberty to insist at the future hearing that the libel does not show a valid rate, or that the evidence does not prove the libel, or any other conceivable defence.

There are several sorts of decisions, orders, decrees, or sentences, in the Ecclesiastical Court. The first class consists of interlocutory orders or decrees, upon incidental matters occurring in the progress of the cause before the hearing, but which decisions offer no bar to the cause proceeding to hearing and definitive sentence. The second class of interlocutory orders or decrees consists of those which have the force of definitive sentences, that is, they are decisions which determine the suit and put an end to the cause, and are therefore called orders or decrees, bearing the force of a definitive sentence, and are not subject to be reviewed at any future hearing. The third class consists of definitive sen-

tences or decrees pronounced at the hearing, by which the case is determined.

Orders of the first class, if improper and objectionable, are denominated grievances, and may be objected to at the time they are made, or at the hearing, but are not the subject of appeal until after definitive sentence. But after definitive sentence has been given, the party complaining may appeal against the grievance alone, or against the grievance and the sentence together, if the sentence is supposed to be objectionable. Orders of the second class, that is, having the force of definitive sentences, may be the subject of immediate appeal, inasmuch as further proceedings in the cause cannot take place during their existence.

* The admission of the libel by the Dean of the Arches *788 in this case constituted what is denominated a grievance, a decree not having the force of a definitive sentence; and which, therefore, cannot be the subject of appeal until after definitive sentence shall be given, and which was no definitive sentence, as before stated, upon any thing but that the cause should be entertained, and is liable to be reconsidered and reversed by the same Judge at the hearing, and is therefore clearly not a sentence within the rule, which confines a plaintiff in prohibition to objections to the jurisdiction apparent upon the libel; while, at the same time, it must be remembered, that the plaintiff's case is, that the absence of jurisdiction is apparent upon the libel.

As some of the Judges appear to have been much influenced by the consideration of the sentence having been pronounced below before the prohibition was moved, it may not be inexpedient to refer to authorities explaining, to the effect before stated, the nature of the various sentences, decrees, and orders in the Ecclesiastical Court. In Ayliffe's Parergon, tit. "Of Sentences Definitive and Interlocutory," page 486, it is thus stated: "A sentence is a judicial declaration which puts an end to a suit according to the nature of the thing in dispute." Page 487: "An interlocutory is a sentence or declaration of the Judge, pronounced betwixt the beginning and end of a cause, touching some incident or emergent matter in the proceeding. A definitive sentence differs from an interlocutory, for that the principal matter in question, and which is principally deduced in judgment, is determined by a definitive sentence. But an interlocutory does not concern the principal matter, but only determines some exception or other

which arises in the proceedings, and by this an end is not put to the principal matter in controversy ; for it is not called a sentence,

without a final condemnation or absolution. It differs

*789 from an interlocutory, *because a person condemned by a definitive sentence may appeal from such sentence ; and the appeal alone, without the inhibition of the superior Judge, suspends the force and execution of the sentence. But, according to the civil law, it cannot be appealed from an interlocutory [sic], unless the grievance be of such a nature that it cannot be redressed by a definitive sentence ; and if it be appealed, the execution of it is not suspended without an inhibition. It also differs from an interlocutory, because, by the word 'sentence,' simply used in a statute or other matter of law, a definitive sentence is always intended, and not an interlocutory ; because a definitive sentence cannot be reversed by the same Judge, but an interlocutory may be reversed at any time by the same Judge before a definitive sentence be pronounced, and in respect thereof it never passes *in rem judicatam*, the Judge having not as yet discharged himself of his office, because the Judge who has pronounced an unjust interlocutory, as by not admitting what ought to be admitted, or by admitting what ought not to be admitted, &c., may even at the foot of a sentence consider thereof, and revoke the same by correcting what he has done amiss. It differs from an interlocutory, because a definitive sentence may, in the cause [sic] of an appeal, be justified from the same, and form new acts. A definitive sentence is not valid unless it be pronounced and given in writing ; but an interlocutory may be pronounced without writing, though it ought afterwards to be reduced into writing, that it may appear from the acts of Court." Other distinctions are pointed out.

Again, in Ayliffe, p. 71, tit. "Of Appeals, their Effects and Incidents belonging to them," it is stated : "An appeal from a definitive sentence is defined to be a judicial right whereby the former sentence is for a while extinguished, and the cognizance of

the cause devolved to the superior Judge, called a Judge

*790 *ad quem*. But this definition, in my *opinion, does not well explain it. Wherefore, I shall define such an appeal to be a provocation from an inferior to a superior Judge, whereby the jurisdiction of the inferior Judge is for a while suspended." In p. 74, par. 4, he says : "A judicial appeal is sometimes made before a sentence is pronounced, and sometimes afterwards. If it

be made before a sentence, it is either made from a grievance or an interlocutory decree; and if it be appealed from a grievance, it is either appealed from a commination of a Judge, or else from some nullity and irregularity in the proceeding which cannot be repaired by a sentence." In p. 76, par. 3, he says: "When a law or statute takes away an appeal from a sentence, it is only meant from a definitive, and not from an interlocutory sentence, because an appeal from a sentence is only meant for a definitive sentence."

In Oughton's *Ordo Judiciorum*, vol. i. tit. 276, two sorts of appeals are described from a definitive sentence, or from an interlocutory decree, having the force of a sentence. And tit. 278 includes the admission or rejection of material matter among the grounds of appeal.

In Clerke's *Praxis of the Admiralty* (of which the proceedings are analogous in many respects to the proceedings in the Consistory Court), tit. 53, "Of an Appeal from the Definitive Sentence," it is said, "It is lawful for either party to appeal from the definitive sentence, or interlocutory decree having the effect of a definitive sentence." And he refers for the manner and form of interposing these appeals to the titles relating to appeals in ecclesiastical causes. In tit. 54, he says, "that it is not lawful to appeal from grievances or an interlocutory decree not having the effect of a definitive sentence," and states as a reason why such appeals are not allowed, "because relief may be had by an appeal from the definitive sentence." Tit. 55 describes what shall be deemed an irreparable *grievance or an interlocutory decree, from *791 which an appeal may be had, and after giving instances in which the decree had the effect of concluding the matter adjudicated, says: "This is called a grievance irreparable, and an interlocutory decree having the force of a definitive sentence. Nor can you hope for any other sentence in that decree." And he refers to Oughton, tit. 123, for a definition of what should be deemed an interlocutory decree having the force of a definitive sentence.

It also appears that a defendant can, before contestation, object that the Court is incompetent, or that the Court has no jurisdiction. Oughton, tit. 223, 224.

Conset's Practice will be found consistent with the authorities I have stated. In part 3, c. 6, § 1, part 2, p. 161, tit. "Of Sentences in those Plenary Causes." In part 5, c. 3, § 1, par. 1, p. 257, tit. "The Manner of appealing and prosecuting Appeals from

Grievances." In part 5, c. 2, § 1, p. 229, tit. "The Manner of proceeding in Causes of Appeal from a Sentence." In p. 400, "Discourse, showing the Order and Structure of a Libel."

This objection is made after appearance, and such is the objection made by the now plaintiff in the Court below, but the authorities I have mentioned are decisive to show that the order admitting the libel is no decision or definitive sentence of any matter in dispute, as every point in contest is open to litigation at the hearing.

The effect of showing that no sentence has been pronounced restrictive of the plaintiff's right to prohibition, therefore, is to raise the question, whether the jurisdiction of the Court to enforce the payment of the rate is shown affirmatively upon the libel; that is, does the libel show a rate made by a majority, in any legal sense, of the vestry?

In reference to this question, it appears from the opinions which have been delivered by the learned Judges that considerable * 792 * differences have prevailed among them as to the effect of the amendment voted by the majority of the vestry.

The statement upon that subject is, that after the church-warden proposed that a rate of 2s. in the pound should be made, an amendment was moved, stating certain reasons why a church rate should not be made, and it concluded with these words: "This vestry feels bound by the highest obligations of social justice and of religious principle to refuse to make a rate, and does refuse accordingly."

Those who deny the validity of the rate insist that the amendment was in effect a direct negative of the proposal to make the rate, although the terms of it also negatived any rate whatever. Those who argue in favour of the validity of the rate, contend that the amendment was merely an idle declaration against church rates generally, but did not import a negative of the 2s. rate proposed, and therefore, they say that the original proposition never having been negatived by the majority, it became competent to the minority to adopt it in the manner stated in the libel, without the question of its adoption being put to the vote.

The effect of the amendment has thus been considered material and open to doubt. But it does not appear to me to be either doubtful or material, as I conceive the question to be, whether the rate is to be considered in law as having been made by the majority

of the actual or constructive vestry. But if the question be material, I think that the amendment was intended to express that those who voted for it refused to make the proposed rate of 2s. in the pound, or any other rate; and I also think it is clear from the statement in the libel that it was understood in that sense by the vestry generally.

In relation to many collateral objections which have been urged against the rate, several of the Judges who held the rate to be valid have observed that the proceedings of a * vestry * 793 cannot be invalidated by the non-observance of any of those forms which regulate the proceedings of other assemblies, and that it is sufficient to render the vestry proceedings legal and binding, if the parties assembled understand what is intended to be done, and assent to it.

Adopting and applying these remarks to the terms of the original proposition, and of the amendment, and to a detail of the manner in which the rate was made, I think no doubt can remain that the amendment was understood by the vestry to have been as well a refusal to make the 2s. rate as a refusal of any other rate. The original proposal was that a 2s. rate should be made — the amendment was that, for the reasons stated, "The vestry feels bound to refuse to make a rate, and does refuse accordingly."

The subsequent course of proceedings seems to me to manifest that this understanding of the vestry was that the majority had by the amendment negatived the 2s. rate proposed. The resolution refusing a rate, although denominated an amendment, was in effect a direct negative of the original proposition, preceded by irrelevant reasoning. Supposing the original proposition had been put by the chairman, and the majority had voted a simple negative, no doubt could have been entertained of the effect; and after a proposal to make a 2s. rate, an amendment concluding with a vote that the vestry "does refuse to make a rate," seems to me to be open to no ambiguity as to its effect.

It appears that the church-wardens and some other of the parishioners had determined that the majority who had voted for the amendment should be treated as having withdrawn from all further interference in making a rate, because if it had not been understood that the 2s. rate had been negatived, I think the proposal that such a rate should be made would have been put by the chairman to the minority. But instead of that course

* 794 being taken, the church-warden * addressed his proposal to those only who were willing to concur, not in a rate generally, but in a 2s. rate; and his invitation resulted in eighteen parishioners signing the 2s. rate; it being, for any thing that appears, quite uncertain whether the persons composing the minority were unanimous in favour of a 2s. rate, and no opportunity was offered to any one to vote against it. It seems to me, therefore, that the 2s. rate was adopted upon the understanding that such rate had been refused by the majority of the vestry.

In proceeding to consider the main question, whether the refusal of the majority of the vestry to make a church rate, when legally bound to do so, gave authority to the minority to make a rate to the exclusion of the majority from interfering in the matter, I cannot but observe that, notwithstanding the parties have expressed their desire that such question should be decided, yet numerous points have been raised by both sides, many of which, if valid, would preclude the necessity of any such decision.

In regard to that question, however, there is no ambiguity as to the fact that the rate was not made by an actual majority of the vestry; but it was made in direct opposition to the vote of the majority; and adopting, in support of the rate, the most favourable construction of which the libel will admit, the facts may be stated to be that a church rate was required to put the church in a necessary state of repair, and to pay the expenses incidental to public worship; that at a vestry, duly assembled, the majority of attending parishioners, upon illegal and unfounded grounds, refused to make a rate; and that the rate in question was made by some of the inhabitants assembled, in opposition to such refusal by the majority.

It is satisfactory that some of the points most material to the decision of the main question are not in controversy. It is admitted that the parishioners of every parish are under * 795 * an imperative legal obligation to provide for the necessary repair of the church, and to the expenses incidental to public worship. It is admitted that the only authority by which a valid church rate can be made, is that of the legal majority of the parishioners duly assembled in vestry. And it is admitted that the rate in question was not made with the consent of the actual majority of the vestry.

But in support of the rate it is said, that although it was not

made by an actual majority of the assembled vestry, it is nevertheless valid as having been made by a constructive legal majority of that vestry. The course of reasoning by which the minority is said to have become a constructive legal majority of the vestry, is by insisting that the vestry being assembled under a legal obligation to make a church rate, when the persons constituting the majority refused to make a rate, they virtually disclaimed and withdrew from interference in the only duty and business of the vestry, whereby the vestry became constituted only of the persons composing the minority, who were willing to make a rate, and that the subsequent interference of the majority, by protesting against a rate being made, was equally illegal and unavailing.

The general proposition that no pecuniary charge or burthen can be imposed, but upon clear and distinct authority, is not controverted. But the present rate is said to be sustainable upon a principle analogous to that upon which votes given at elections to disqualified candidates are held to be unavailing, or as it is called, thrown away, and which principle it is said requires that the votes of the majority refusing to make a rate should be held to be altogether nugatory.

There is no doubt that the rule or principle referred to has been acted upon in elections, but no text-book or authority has been mentioned in which it has been recognised as *a general principle, or has been adopted in other than in election cases, still less in cases connected with the imposition of pecuniary burthens, or as creating an exception to the admitted rule of law that a valid church rate can alone be made by a majority of the vestry.

The history of church rates and the law which has hitherto been recognised as applying to them may require a remark. Numerous instances have heretofore occurred of vestries refusing to do their duty by making a required church rate, and during that time many learned Judges have filled the Courts of law and the Ecclesiastical Courts. And the study of the ecclesiastical law was more generally pursued in former than in modern times, and many of the higher clergy were familiar with it, but no exception to the general proposition of the power to make a church rate being in the majority of the vestry has ever been suggested, nor any mode by which the illegal refusal of a vestry to do its duty could be countervailed. The evil was considered irremediable except by

coercion of the contumacious parishioners, and the method of coercion resorted to was either excommunication or interdict, the latter of which proceedings involved those willing to make a rate, alike with the unwilling, in one common punishment. But, although no rate might be made, the injustice was alleviated by those who professed their willingness to concur in making a rate being absolved, which it is not probable would have been done, but upon the assumption of the inability of the absolved, of their own power in vestry, to make the required rate.

When the lengthened period during which this state of things continued is considered, while the absence of any power to make a valid church rate in opposition to a contumacious majority was

deeply lamented, a strong presumption arises against the

* 797 validity of the remedy supposed to * be recently discovered,

the discovery or invention of which is not recommended by the artificial presumption, contrary to truth and fact, upon which it rests.

The application of the principle seems to require that, while the law is admitted to be, that a rate can only be made by a vote of the majority of the vestry, yet, if such majority shall, contrary to legal duty, vote against making a rate, the law presumes from such vote, that the majority withdrew from all interference in the matter of making a church rate, and became virtually absent from the vestry, and so became disentitled to any opportunity of voting upon any rate, of whatever amount, the minority might propose to adopt ; the simple effect being to transfer a power of taxation, hitherto held to be by law possessed only by a majority, to the minority ; and this effect is said to be warranted and supported by analogy.

The distinction must never be overlooked between persons upon whom the law has bestowed power and authority declining to interfere in relation to the subject matter to which the power and authority apply, and those who insist upon acting in relation to it, and who object to the power and authority exercised adversely to or without them. In the first case, if the majority of the parishioners in vestry should refuse to vote or interfere upon the question whether a church rate shall be made, and quiescently leave the whole matter to be managed by the other assembled parishioners, there can be no doubt that the quiescent majority would be bound by a rate made by the minority. Such a result can hardly be said

to follow in the second case ; and in this instance the actual interference of the majority throughout was recognised by the vestry, as well by the amendment being put to the vote, as also by the protest against the attempt to make a rate in spite of their dissent being entered as part of the proceedings of the vestry. * Under such circumstances, to presume absence * 798 and non-interference is to presume against the recorded facts.

It is not unimportant that the argument in favour of the rate not only bestows the power of making a rate, but also the power of regulating and deciding upon the amount of it, which involves many points of discretion, in which absent persons were interested.

If the law which has hitherto prevailed is discovered to be founded in error, and the correct rule of law is, that when the majority of the vestry refuses to make a required rate, the power to make such rate devolves upon the minority, it seems to me that the law ought to be so declared in plain terms. But I think the law ought not to be altered upon the authority of remote and analogous circuitous reasoning, and tortuous presumptions and constructions regarding the acts and intentions of men, contrary to palpable fact and truth.

While it is said that the rate is valid upon a principle analogous to that adopted in election cases, the principle thus relied upon has never been distinctly enunciated, and I have not been able to discern in those cases any principle which seems to me to be applicable, either directly or by analogy, to the present case.

It is admitted that it is essential to the validity of a church rate, that it should be valid by a majority of the vestry ; and it cannot be contended that the rate in question had the sanction of the majority, or was ever put to the vote. The most that is said is that the amendment was not a negative of the rate, and the justification of the omission to put the rate to the vote is, that it is said it would have been an idle and useless ceremony to have done so, as the vote for the amendment, although not in itself involving a negative of the proposed rate, yet demonstrated that the majority who voted for the amendment would also vote * against the proposed rate. But I cannot admit that the * 799 rate can have any greater degree of validity than would have attached to it if it had been put to the vote and negatived

by the majority, as it is assumed would have been the event. And there seems to be still greater difficulty in maintaining the validity of a rate which was shown to be distinctly negatived by a majority of the vestry. I doubt if the effect of an anticipated negative can be evaded by omitting altogether to put a rate to the vote. Suppose after the amendment had been carried the vestry had adjourned for half an hour, more or less, the parishioners all remaining in the vestry, could the minority at an adjourned vestry have adopted a rate in a manner to preclude any voting upon it?

Considering that by law an affirmative vote of the majority of the vestry is essential to the validity of a church rate, it seems to be an extraordinary position that a negative vote given by the majority, although contrary to the legal duty of the voters, is not only unavailing, but that it also destroys the voting capacity of the majority upon any other question. The question upon the amendment was, whether the vestry should refuse to make any rate, which was carried in the affirmative. Those who supported the rate say that the question, whether a 2s. rate should be made, remained unaffected by such vote ; and yet it is contended that, by voting for the amendment, the majority, and, with the majority, the absent parishioners, lost altogether the right of having the 2s. rate put to the vote.

The entry of the proceedings proves that the vestry acted at the outset according to the usual form, under a chairman, and decided propositions by vote, but, without any question being put in regard to departing from that course, authority was assumed to make

the rate in a different manner, that is, not through the
* 800 agency of the chairman,* nor by putting it to the vote.

The object intended to be gained by not putting the 2s. rate to the vote, was obviously that the majority might not have an opportunity to vote against it, which I think could not lawfully be done ; and it seems to me that the validity of the rate ought to be determined, either as having been negatived by the amendment (which I think it was), or as not having been put to the vote, and being invalid for that reason.

Many cases may be imagined by which the soundness of the principle contended for may be tested. Suppose a commissioner of Oyer and Terminer, with a power of executing it, given to a majority of the commissioners duly assembled, and that the commissioners being assembled, the majority of those present, instead

of executing the commission, should assume authority to control the proceedings, and for bad reasons, or no reason, and contrary to legal duty, should protest against the commission being executed. In such a case, very few lawyers, who might compose the minority, would, in defiance of a protest by the majority, proceed to trial, judgment, and execution under it. And it would not be an easy task to maintain the validity of a judgment pronounced by the minority under such circumstances, the record disclosing the facts. The case thus supposed arrests the attention from its importance, but the argument is the same whether applied to important or to trifling trials, whether for capital offences or for petty misdemeanour, or, as it seems to me, to the making of a church rate.

If the principle contended for be general and sound, considering its great importance and the extensive application of which it is capable, it is extraordinary that such a principle should nowhere be recognised, except, as it is said, in election cases. I cannot think that its recognition as a general principle should be first found in a case relating to the imposition of a pecuniary burthen. The so-called "principle" seems to * me not more * 801 sound, although more dangerous, than some of those which have heretofore been adopted to warrant the imposition of pecuniary burthens, and which in their consequences have not left a reasonable motive for imitation, but have, on the contrary, led to most distinct declarations of the law, to the effect that such burdens cannot be supported but upon the clearest authority. The application of this novel doctrine to a case like the present is only calculated to produce perpetual conflict and litigation, as, if the majority of a vestry should be determined to defy the law or to evade it, means will be found to accomplish the purpose by voting illusory rates, or by confining the vote to a simple negative of every rate proposed, or by resorting to other equally inconvenient but effectual means.

In large bodies, whether acting politically or judicially, the reasons of a majority for voting against the adoption of proposed measures may often be impugned, and held by the minority to be irrelevant or otherwise invalid, and made the pretence on the part of the minority for assuming the character and power of a majority.

It has been properly asked, May a minority of the House of Commons elect a speaker in opposition to the majority? May the

minority of the House of Commons meet and grant supplies against the dissent of the majority? May the minority of the House of Lords proceed to judgment upon an impeachment, or any other judicial proceeding, against the dissent of the majority, upon the alleged ground that the dissent of the majority to pronounce judgment is founded upon insufficient or illegal grounds? In like manner and circumstances, May the minority of justices in session act in opposition to the dissent of the majority?

I am not aware of any authority for the position that, where the law gives a power to a definite number or a definite portion * 802 of an indefinite number, the refusal of the * majority to concur in the proposed exercise of the power is of the less legal effect as a negative, because such refusal may be illegal and may even subject the party making it to punishment.

The principle contended for is so novel, so extremely important, and may be of such extensive application, that the authorities which are supposed to establish or recognise it require to be carefully examined. These authorities are limited to certain election cases; but I cannot discover the connection or analogy between the rules which govern corporate elections and the law which gives the power to impose pecuniary burthens. To support the imposition of a pecuniary burthen by the application, by analogy, of such rules to matters of taxation, does not seem to be consistent with the admitted law, that taxation can only be enforced upon clear and undoubted authority. It may be observed also, that the law regarding elections stands much less upon principle and more upon absolute rules, originating in that peculiar branch, and for the most part never yet applied to any other branch of the law, than it does in most other departments of it.

Four cases have been cited and relied upon, as establishing or recognising the principle which, it is said, supports the validity of the rate. Two of the cases cited were decided during the time when Lord Mansfield presided in the Court of King's Bench, one during the time when Lord Chief Justice Lee presided; and the fourth case, during the time when Lord Ellenborough presided; in which last case the judgment was affirmed in the House of Lords. The cases referred to are *Taylor v. Mayor of Bath*, reported in Luders,¹ and cited in *The King v. Hawkins*.² The * 803 two cases decided in the time of Lord Mansfield are * *Old-*

¹ 3 Luders, 824.

² 10 East, 211.

know v. Wainwright,¹ and *The King v. Monday*;² and the case in Lord Ellenborough's time was *The King v. Hawkins*. I will state first the simple facts of the cases relied upon, and then consider their authority and application to this case.

The case of *Taylor v. The Mayor of Bath*,³ and correctly stated in *The King v. Parry*,⁴ related to the election of common councilmen for the corporation of Bath. The elective body consisted of the major part of the mayor, the recorder, the aldermen, and common councilmen. A meeting of twenty-seven electors was held; three candidates were proposed: Taylor, Bigg, and Kingston. Bigg was not qualified, and before the election notice was given of his disqualification; Bigg polled fourteen votes, Taylor thirteen, and Kingston one. The question turned upon Taylor's election; upon a motion by Taylor for a mandamus, the Court held Taylor duly elected, on the ground that the votes for Bigg, after notice of his disqualification, were thrown away, and did not operate as a negative against Taylor. The case of *The King v. Hawkins*⁵ was decided upon the same point precisely, so far as it has any relation to this case, and upon the authority of *Taylor v. Mayor of Bath*. These two cases are cited as decisive authorities, to the effect that where votes are given after notice to a disqualified candidate, the election must be decided as if no such votes had been given.

The case of *Oldknow v. Wainwright*⁶ is reported in association with *The King v. Foxcroft*. The case came before the Court upon a special verdict in a feigned issue, which had been directed to try the validity of the election of one Seagrave to the office of Town Clerk of Nottingham, * and the special * 804 verdict found, among other facts not relevant to this case, that at a meeting of twenty-one corporators, Seagrave was the only candidate put in nomination for the office; that only nine of the corporators voted, and they all voted for Seagrave; that after the election had begun, and after votes had been polled for Seagrave, eleven of the corporators protested against the election proceeding, upon the ground that the office was full by Foxcroft; that the protest was disregarded, and the mayor declared Seagrave duly elected, and he was sworn in and was held

¹ 2 Burr. 1017, 1 W. Bl. 229.

⁴ 14 East, 558, note.

² Cowp. 530.

⁵ 10 East, 211, 2 Dow, 124.

³ 3 Luders, 324.

⁶ 2 Burr. 1017.

to be well elected, it having appeared that Foxcroft was not well elected.

Lord Mansfield, in giving judgment, said : " That the electors who protested had no right to stop in the middle of an election ; that there was no question of adjournment ; that the protesting electors had no way to stop the election, when once entered upon, but by voting for some other person than Seagrave, or at least against him ; whereas they had only protested against an election." And Lord Mansfield also said : " Whenever electors are present and do not vote at all, as they have done here, they virtually acquiesce in the election made by those who do vote."

The case of *The King v. Monday*¹ was also decided by Lord Mansfield. That related to the election of seven aldermen for the borough of Portsmouth. The electors were the majority of the mayor, aldermen, and burgesses. The mayor and four aldermen assembled. Three aldermen protested against the meeting, but the mayor and one alderman persisted in going to the election, and proposed seven candidates and voted for them ; notwithstanding the protest, the three aldermen voted against them, and then proposed seven other candidates, six of whom were objected * 805 * to as disqualified. The defendant was one of the seven proposed by the mayor and one alderman. And the question was as to the validity of his election.

Lord Mansfield said that the difference between parliamentary elections and corporate elections must not be confounded ; that in parliamentary elections there was no mode of defeating one candidate but by voting for another, but that in corporations it was a different thing ; and that, as the seven candidates had been proposed in one list, the question was whether the seven should be elected, and the only answer to be given was " Yes," or " No." And upon that question there had been a majority against the seven in form and substance, which made an end of the whole matter. The judgment was against the validity of Monday's election, not only upon the ground of a negative majority against, but also, that four of the candidates for whom the three aldermen voted were eligible.

It may be proper to remark that, in *The King v. Monday*, and in *Oldknow v. Wainwright*, Lord Mansfield seems to have repudiated the dictum of some of the Judges in the case of *Taylor v.*

¹ Cowp. 530.

The Mayor of Bath, that a negative vote could not be given in corporate elections.

In *Oldknow v. Wainwright*, Mr. Justice Wilmot cited the case of *The King v. Withers*,¹ a case where five electors had voted and six refused to vote, and the Court had held that the six had virtually consented. What the objection to the election was, only appears by inference; and it would seem to have been that the candidate had not received the affirmative votes of the majority of the elective body. It does not appear that any elector voted against him, or for any other candidate; and it being cited as an authority for the decision then about to be given in *Oldknow v. Wainwright*, * the inference is, that it was considered to show that the majority of the corporators actually voting constitutes the elective body, whatever may be the number of electors required to be present to constitute a good meeting. * 806

In the cases cited, the elections took place by virtue of the charters, no vote of any kind being necessary to sanction them, and it was no condition in the election of the candidates that they should obtain a majority of the corporators assembled, but only a greater number of votes than any rival candidates; except that in *Oldknow v. Wainwright*,² Lord Mansfield stated that, in corporate elections, negative votes might be given against a candidate; and he observed that those who objected to an election taking place had not voted against Seagrave; whereas in parliamentary elections there was no mode of opposing the election of the candidate other than by voting for a rival candidate. And in *The King v. Monday*³ that doctrine was acted upon. The aldermen who first protested against any election taking place voted against the candidates proposed by the mayor, and also for seven candidates of their own nomination, and such of those candidates as were qualified were held to be duly elected, to the exclusion of those nominated by the mayor and the one alderman.

The distinction, I repeat, between those cases and the present is, that the law did not require any vote of the corporation assembled to authorise the election, but, for the purpose of the making of a valid church rate, the law did require the vote of a majority of the assembled parishioners. Further, in the election cases, the candidate required only a majority of those who should vote either for

¹ 2 Burr. 1020. See the note of the reporter.

² Cowp. 530.

³ 1 W. Bl. 229, 2 Burr. 1017.

* 807 or against him, or a majority over any rival qualified candidate, and not a majority of the corporate * assembly.

Again, a majority of the assembled corporators voting that an election should not take place, might be nugatory to stop an election prescribed by the charter; but an affirmative vote was not required to sanction the election, while such a vote is required to sanction a church rate. The analogy, therefore, fails in the essential point, that is, that to make an election a lawful election, no vote is required, and for the election of the candidates only a relative majority is required, that is, a majority of the votes polled for or against the individual candidate, or a majority of votes over a qualified rival candidate. Whereas, in this case, to make a valid rate, the vote of a majority of the assembled parishioners was absolutely required, which the rate in question never had; and further, in *The King v. Monday*, the protest of the majority of the electors against any election taking place, which was an idle and irrelevant proceeding, was not pretended to have the effect of disqualifying them from voting against the two candidates they opposed, or to authorise the mayor to reject their votes, and to treat them as having virtually withdrawn from the business of the election, and to declare the candidates for whom the mayor voted to be duly elected.

I cannot perceive any view of that case which renders it an authority for the position, that, because the majority here had, for irrelevant reasons, voted against any rate being made, the minority acquired the power to make the 2s. rate without putting the question or allowing the majority an opportunity of voting upon the question. To make the cases analogous, the mayor and one alderman should have declared the candidates favoured by them to be duly elected notwithstanding the protest or the votes of the majority against them.

Again, in *Oldknow v. Wainwright* it will be observed that, although the majority had protested against any election * 808 * taking place, so far from the Court deeming that protest to have disentitled and precluded the protesters from all right of further interference, Lord Mansfield states, among the grounds for his opinion, that the protesters had not moved an adjournment before the election began, importing that a motion of adjournment made in due time, that is, before the election began, would have been available, notwithstanding their previous

protest. And he also states among those grounds, that the protesters had not voted against Seagrave, importing also that they might have done so effectually. Seagrave's election, therefore, was sustained, not because by the protest those who made it virtually withdrew from the business of the election, but because they themselves forbore (not that they were excluded) further to act, by moving an adjournment or by voting against Seagrave.

From the circumstances in *Oldknow v. Wainwright* it appears that a protest that no election should take place, though irrelevant, idle, and unlawful, did not disentitle those who made it from voting upon the relevant question of Seagrave's election ; and it is to be inferred from the cases of *Taylor v. The Mayor of Bath*, and *The King v. Hawkins*, and the cases cited in *Oldknow v. Wainwright*, that notwithstanding the irrelevant and thrown-away votes for the disqualified candidates, the voters who gave them were entitled to give, and might have given, if they had thought fit, legal and effective votes against the qualified candidates, but which they did not do.

The cases are cited as authorities for the point, that votes given for disqualified candidates are not only nugatory and thrown away, but that thereby the voters are excluded from interfering further in the election, and that the election may proceed upon the footing of their exclusion. But the cases of *Oldknow v. Wainwright* and *The King v. Monday* are authorities to the direct contrary, and in *Taylor v. The *Mayor of Bath*, and in *The *King v. Hawkins*, and the other cases cited, no attempt was made by the voters for the disqualified candidates to vote against the qualified candidates ; and therefore no question arose in regard to their right to do so if they had thought fit.

It is true that in *Taylor v. The Mayor of Bath*, Justices Page, Chappell, and Wright are reported to have said that negative votes could not be given in corporate or parliamentary elections, which opinion, however, seems to have been overruled, if not in *Oldknow v. Wainwright*, certainly in *The King v. Monday*. But the dictum of Justices Page, Chappell, and Wright did not refer to the fact of votes having been given for the disqualified candidates, but was laid down as a general rule in election law.

I am utterly unable to discover how any one of these cases shows that what is called an irrelevant vote, whether given contrary to the legal duty of the party or not, disqualifies him from

voting upon a distinct proposition to be afterwards determined ; that is to say, I do not perceive any proper ground for holding that because the majority refuses to make any rate, the minority may make a rate of any given amount, and exclude the majority from voting upon it ; and that such rate should be deemed to be a rate made by a constructive majority of the vestry. If such be the law, it is certainly not to be found in the cases cited.

The analogy between the law upon which the rate is said to be valid, and that which prevails in parliamentary elections, has been said to be complete, because no vote of the electors can prevent the election taking place pursuant to the writ ; and because votes for a disqualified candidate after notice are nugatory. I cannot admit the analogy. The electors have no control over parliamentary elections. Their votes, if there was any authority to take them, can neither authorise nor prevent an election. But

* 810 to make a * church rate, a vote of the electors, that is the parishioners, is indispensable. Nor can I see how the fact that no vote by electors can prevent a parliamentary election taking place is any authority for the position that no vote by the parishioners can prevent a church rate being made. In the absence of an affirmative vote of the vestry there is no authority to make a church rate, but absence of a vote of the electors does not prevent a parliamentary election taking place. In parliamentary elections the question is not, Do you approve of a particular candidate, aye or no ; but do you prefer any other qualified candidate ? If there is no other qualified candidate, there is no mode of opposing the qualified candidate put in nomination, and by your voting for a disqualified candidate after notice, Lord Mansfield says, in *Oldknow v. Wainwright*, it is the same as if you did not vote at all.

But suppose there to be three candidates for a borough returning one member, and one of the candidates is disqualified, and certain electors, after notice, vote for him ; if by so doing they have thrown their votes away and are to be deemed as not having voted at all, what is there to preclude them from voting for one of the qualified candidates ? The authorities cited import that they may do so, which favours any thing rather than the proposition that by the irrelevant vote for the disqualified candidate they excluded themselves from any further interference in the election.

But I ask, Upon what general principles of law are these rules

relating to elections founded ? I wish to know where they are to be found. If these cases are supposed to be governed not upon rules peculiarly and only applicable to them, but are also instances of the application of some established general principles of law, reference ought to be made to the depository where these principles are to be found, or other instances in which they have been applied * ought to be shown. But notwithstanding * 811 that ingenuity, much beyond what is ordinarily exhibited in the maintenance of a particular case, has been manifested in support of the present rate, yet these election cases are alone relied upon.

I cannot help thinking, that the circumstance of a number of persons, no doubt respectable in their general character and position, having been so misled as to avow their determination to disobey the law, and to refuse to perform an obligation unquestionably resting upon them, is so extraordinary, that it has called forth much energy to overcome such illegal resistance to the law and duty. But I think the means by which that attempt has been made, if successful, would produce public mischief much beyond that which is sought to be redressed. The subjects of this country are much too right-minded, and estimate too correctly the benefits that result from a general obedience to a law while it exists, and the enormous evil which may result from persons, of the class of the rate payers of a parish, entering into an open and avowed combination to evade or defy the law, to render it probable that the evil example which has been set will be followed to much extent. But the perversion of the law, by which alone I think this rate has been attempted to be supported, and the adoption by the Courts of law of strained analogies and presumptions in favour of an attempt to impose pecuniary burdens under any denomination, are calculated not only to bring discredit upon, and to destroy confidence in the law, but also to produce greater and more permanent evils than that which it is the object of such a course to prevent.

It has been argued, in support of the rate, that it was the duty of the vestry to make a church rate, and a refusal to make it was unlawful, and that the majority could not compel the minority to do or join in an unlawful act, or to * omit to perform a legal duty, which, it is said, would be the effect of the vote of the majority, unless the right and power of making a rate devolved upon the minority. But surely the fallacy of such

reasoning is very obvious. It is only the duty of the minority to use all lawful means in their power to make a church rate, which they will have done when they shall have voted for a rate. But if the law requires a vote of the majority of the vestry to make a valid rate, the minority is neither guilty of an illegal act, nor guilty of any unlawful omission, because it is coerced and counteracted by the majority to whom the law has confided the power of making the rate. The unlawful act is rather in the attempt, by any men, to assume a power, which the law has not given to them, to make a rate binding others, over whom the law has given them no authority.

The general principle of law being admitted, that the power of making the rate is given to the majority of the vestry, the onus of proving the power of the minority, under the circumstances, to make the rate now asserted for the first time, is upon those who make the assertion; and I think no such power has been proved to exist by law. I have thus examined the election cases at length, because they are the only authorities relied upon in support of the rate, and I have anxiously endeavoured to estimate the weight of them, and their application to this case; and having done so, I do not think they ought to be deemed to be authorities for the purpose for which they have been cited. I do not think those cases establish or recognise any principle which can be applied to this case or made the foundation of a decision in support of the rate in question. And further, I am of opinion, that neither principle nor authority has been produced for the doctrine that,

when it is their duty, and they are lawfully required to do

*813 *so, the power of making the rate devolves upon the minority of the vestry. And I am of opinion that the libel exhibited in the Consistory Court shows affirmatively that the rate of which it is the object of the suit instituted in that Court to enforce the payment is an invalid rate.

The opinion which I have expressed is founded upon the assumption, that the libel is to be construed as importing that the rate was made by the minority of the parishioners in vestry who voted against the amendment, which is a construction more favourable for the support of the rate than I think the record warrants. In my opinion, the true construction of the libel imports that the rate was made by the church-wardens and the

eighteen parishioners who signed it; and I am satisfied that all opportunity for any one to vote against the rate was studiously excluded.

Upon the view of the case which I have taken, I am prepared respectfully to recommend to your Lordships to reverse the judgment of the Exchequer Chamber and the judgment of the Court of Queen's Bench.

THE LORD CHANCELLOR. — My Lords, not having had the advantage of hearing the arguments in this case, I do not propose to take any part in the discussion. I rise simply for the purpose of saying that, having followed my noble and learned friend in the very able address which he has made to the House, so far as I can form any opinion, not having heard the arguments, I most entirely concur in what has fallen from him, with, perhaps, one exception. I confess my impression was, when I was a member of the Court of Exchequer Chamber, and the matter was before me then with the other Judges, that there was sufficient on the record to show that the rate had been made by all those who constituted what has been called "the minority." Of course, as I * did not hear the case argued at your Lordships' bar, I * 814 give no opinion at all upon the case, and should have taken no part in it, had it not been that my noble and learned friend Lord Brougham, who did hear this case, but was compelled by ill health to quit London before the matter came under final decision in your Lordships' House, requested me to say that having, by the courtesy of my noble and learned friend, seen the opinion that he was about to give, in moving the judgment of your Lordships' House, he entirely concurs in the whole judgment, with, perhaps, that same qualification which I have stated. He added, that the doubt he expressed as to that point, rather adds to the force of this judgment in respect of the main result, because it excludes the notion of coming to this conclusion upon any other ground than the general ground that the rate must be made by the majority, and that no other rate is valid.

Judgment of the Exchequer Chamber, and judgment of the Court of Queen's Bench, reversed.

Lords' Journals, 12th August, 1853.

* 815

* JEFFERY'S v. BOOSEY.

1854. February 16, 17, 20; June 29; August 1.

CHARLES JEFFERY'S, *Plaintiff in error.*
 THOMAS BOOSEY, *Defendant in error.*

Foreigner. Copyright. Assignment of Copyright.

The object of 8 Anne, c. 19, was to encourage literature among British subjects, which description includes such foreigners as, by residence here, owe the Crown a temporary allegiance,¹ and any such foreigner, first publishing his work here, is an "author" within the meaning of the statute, no matter where his work was composed, or whether he came here solely with a view to its publication.

Copyright commences by publication; if at that time the foreign author is not in this country, he is not a person whom the statute meant to protect.

An Englishman, though resident abroad, will have copyright in a work of his own first published in this country.

B., a foreign musical composer, resident at that time in his own country, assigned to R., another foreigner, also resident there, according to the law of their country, his right in a musical composition of which he was the author, and which was then unpublished. The assignee brought the composition to this country, and, before publication, assigned it, according to the forms required by the law of this country, to an Englishman. The first publication took place in this country:—

Held, reversing the judgment of the Court of Exchequer Chamber, that the foreign assignee had not, by the law of this country, any assignable copyright here in this musical composition.²

Per LORDS BROUGHAM and ST. LEONARDS.—Copyright did not exist at common law; it is the creature of statute.

Per LORD ST. LEONARDS.—No assignment of copyright under the 8 Anne, c. 19, the benefit of which is claimed by the assignee, although from a foreigner, can be good in this country, unless it is attested by two witnesses.

Per LORD ST. LEONARDS.—There cannot be a partial assignment of copyright.

THIS was an action on the case brought in the Court of Exchequer by T. Boosey against C. Jefferys. The declaration * stated that the plaintiff was, and still is, the proprietor of the copyright in a certain book, to wit, a musical composition called "*Come per me sereno;*" *Recitativo e Cavatina*

¹ See per Lord Westbury in *Routledge v. Low*, Law Rep. 3 H. L. 103.

² See *Routledge v. Low*, Law Rep. 3 H. L. 100; *Houldsworth v. McCrea*, Law Rep. 2 H. L. 380.

nell' Opera La Sonnambula, del M. Bellini, which said book had been and was first printed and published in England, and within twenty-eight years last past, and which copyright was subsisting at the time of the committing of the grievances, &c. Yet the defendant, contriving to injure the plaintiff, and to deprive him of the gains, &c. which he might, and otherwise would have derived from the said book, and also to deprive him of the benefit of his copyright therein, heretofore and after the passing of a certain Act of Parliament, &c. (the 5 & 6 Vict. c. 45), and within twelve months before the commencement of this suit, to wit, &c. wrongfully, and without the consent in writing of the plaintiff; so being the proprietor of the said copyright, did, in England, unlawfully print and cause to be printed for sale, divers copies of the said book, contrary to the form of the statute. And the defendant further contriving, &c., heretofore and within twelve calendar months next before the commencement of this suit, to wit, &c., did wrongfully, and without the consent in writing of the plaintiff, so being the proprietor of the copyright, unlawfully sell and cause to be sold, and unlawfully publish and cause to be published, and expose to sale and hire, and caused to be exposed to sale and hire, and unlawfully had in his possession divers, &c. copies of the said book, then on those days and times, &c., well knowing the said copies, and each and every of them, to have been unlawfully printed, contrary to the form of the statute. By means, &c. the plaintiff has been hindered and prevented from selling, &c., and his copyright has been and is greatly injured and damnified, to the plaintiff's damage.

The defendant pleaded, first, that the plaintiff was not * the proprietor of the copyright in manner and form, and * 817 secondly, that there was not, at the time of committing the supposed grievance, a subsisting copyright in the book, as alleged.

The plaintiff took issue on these pleas.

The cause came on for trial before Mr. Baron Rolfe, at the sittings after Easter Term, 1850, when it appeared in evidence that the opera in question was composed at Milan, in February, 1831, by Vincenzo Bellini, an alien, then and since resident at Milan; that by the law of Milan, he was entitled to copyright in this opera, and to assign such copyright; that on the 19th of February, 1831, he did, by an instrument in writing, according to the law of Milan, assign the copyright to Giovanni Ricordi, also an

alien, and resident at Milan ; that according to the law of Milan, such copyright, and the right of assigning the same, thereby became vested in Ricordi ; that on the 9th day of June, 1831, Ricordi being then in London, duly executed, according to the laws of England, an indenture, made between himself and the plaintiff, which indenture recited the above facts, and assigned all Ricordi's interest in the copyright in the opera to the plaintiff, but for publication in the United Kingdom only. The plaintiff further proved that he was a native-born subject, resident in England ; that the opera was first published by him in London on the 10th June, 1831, and that there had been no previous publication thereof in the British dominions, or in any other country ; and on the same day the book was duly registered in the Stationers' Company and copies deposited there according to law. The plaintiff further proved that, on the 13th of May, 1844, he caused a further entry to be made in the registry of the Stationers' Company, for the purposes of the statute passed in the 5 & 6 Vict. c. 45, and these entries

were proved in evidence at the trial. Mr. Baron Rolfe .

*818 *then, in conformity with the decision in *Boosey v. Purday*,¹ directed the jury that the matters given in evidence were not sufficient to entitle the plaintiff to a verdict on either of the issues, and that the verdict must be found for the defendant. A bill of exceptions was tendered to this direction. The cause came on to be heard on the bill of exceptions (which set forth the pleadings and facts above stated) before the Judges in the Court of Exchequer Chamber, on the 20th May, 1851, when judgment was given declaring the direction at the trial to be wrong, and a *venire de novo* was awarded.² A writ of error was then brought in this House.

The Judges were summoned, and Lord Chief Justice Jervis, Lord Chief Baron Pollock, Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Justice Wightman, Mr. Justice Erle, Mr. Baron Platt, Mr. Justice Williams, and Mr. Justice Crompton attended.

Mr. Serjeant Byles and *Mr. Quain* for the plaintiff in error. — The judgment of the Court below is wrong, for Ricordi possessed no copyright in England, and his assignment passed nothing. It is a generally understood principle, that a municipal law, such as

¹ 4 Exch. 145.

² 6 Exch. 580.

that of copyright, does not extend beyond the limits of the country which enacts it. Story's Conflict of Laws.¹ If the laws of two countries conflict, the decision must be according to universal principles of law, or according to the special law of the country where the suit is prosecuted.

[LORD BROUHAM.—That principle was declared in this House in *Don v. Lippmann*,² the authority of which * has been universally recognised. It is quoted many * 819 times by Story.]

In the United States, the law expressly declares that no person has copyright there but one who is a native of the States, or a resident in them;³ and it appears doubtful whether he must not be such a resident as may become an American citizen.⁴ In this country the law has not been so expressly declared by statute, but the statutes that have been passed upon that subject bear a similar interpretation. Starting from an acknowledged point, the course is perfectly * clear. The case of *Chappell v. Purday*⁵ decides that a foreign author resident abroad, whose works are published in this country, has not, under the Statutes of

¹ Sections 7–18, 375, 425, 436.

² 5 Clark & F. 1.

³ The words of the Act of Congress of 3 Feb. 1831, § 1, are: "Any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book, map, chart, or musical composition, which may be now made or composed and not printed and published, or shall be hereafter made or composed, or who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked, from his own design, any print or engraving, and the executors, administrators, or legal assignees of such person or persons, shall have the sole right and liberty of printing, reprinting, publishing and vending such book or books, map, &c., &c., in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter described."

⁴ Curtis on Copyright, p. 141: "In the United States there can be no copyright of a book, map, chart, or musical composition, print, cut, or engraving, unless the author be a citizen of the United States or resident therein, at least at the time of publication. Whether it is necessary that the work should have been made or composed in the United States, or while the author was a citizen of, or resident in the country, does not present a question of much doubt"; he then gives the provisions of the statute of 1831, and after describing the questions that may arise as to the length of the foreigner's residence in the United States, and whether it amounts to domicile, he says, speaking of the Act of Congress, "Does it mean that he must have resided while he made or composed his work, or can a resident foreigner publish and take a copyright of a work which he has composed abroad?"

⁵ 14 M. & W. 303.

8 Anne, c. 19, and 54 Geo. 3, c. 136, any copyright here. That case was decided in 1845, and it was there said: "The general question, whether there was such a right at common law, was elaborately discussed in the great cases of *Millar v. Taylor*¹ and in *Donaldson v. Beckett*."² In the latter of these cases, it was distinctly decided that copyright was entirely the creature of the statute,— a decision that was adopted and recognised by Lord Kenyon, in *Beckford v. Hood*,³ and seems to be assumed by Lord Ellenborough, in *The University of Cambridge v. Bryer*,⁴ and asserted by Lord Tenterden, in *White v. Geroch*.⁵ *Hinton v. Donaldson*⁶ was a case in Scotland, that preceded the decision of *Donaldson v. Beckett* in this country, and there twelve of the Judges held that there was no copyright at common law, Lord Monboddo being the only Judge who took an opposite view of the question. In *Boosey v. Purday*,⁷ where the facts were the same as here, it was decided that a foreign author domiciled abroad had no copyright in England. That decision, which was, in fact, made after reconsidering an opinion to the same effect previously intimated in *Chappell v. Purday*,⁸ seems to have been misunderstood when the present case was in the Court of Exchequer Chamber.

The chief case on the other side is that of *Cocks v. Purday*,⁹ where the Court of Common Pleas held that
 * 821 * a foreigner, resident abroad, might, in a book first published by him in this country, have an English copyright which he could assign to another. That decision was pronounced in 1848. After that came *Boosey v. Davidson*,¹⁰ which supported *Cocks v. Purday*, and indeed adopted it as a guiding authority. The question now will be, whether those decisions can be supported.

The title to copyright is given by statute, and is a right which can only be exercised in England according to the statute. It is a right as strictly local as are rights to an estate, or to any easement incident or appurtenant to an estate; it is a municipal law which can have no force in any other country. There is no dispute here

¹ 4 Burr. 2303.

⁴ 16 East, 317.

² 4 Burr. 2408, 2 Brown, P. C. 129.

⁵ 2 B. & Ald. 298.

³ 7 T. R. 620 – 627.

⁶ 5 C. B. 860.

⁷ Dict. of Decisions, tit. Literary Property, p. 8307; Fol. Dic. v. 3, p. 388.

⁸ 4 Exch. 145.

⁹ 14 M. & W. 319.

¹⁰ 18 Law J. N. S. Q. B. 174, 13 Q. B. 257.

as to Ricordi's Italian copyright, but that does not give the plaintiff any rights in England. Bellini's assignment to Ricordi may, for this part of the argument, be assumed to have passed to Ricordi what Bellini possessed, but that was Italian copyright alone ; he did not possess any English copyright, and therefore he could not pass any by assignment. It may be admitted that he possessed the power to withhold the publication in England ; but if he did not withhold publication, but published, unless he was actually domiciled here, he could not, by the act of publication, acquire copyright in this country. Now he made his assignment before he had done that which would vest copyright in him. The case is even stronger, if considered in another way. Bellini did not send Ricordi here as his agent, but as his assignee ; the assignment in Milan did not vest property in England, and Ricordi was therefore, in this country, the assignee of a person who had nothing here to assign. In the argument in the Court below, the case of Gibbon was referred to, and it was said that he was domiciled at Lausanne, and was for such a purpose a foreigner ; but the reference is not in * point, for Gibbon was an English subject, who, though he lived for years at Lausanne, never lost his English domicile. That was a personal quality, and "*Qualitas personam, sicut umbra, sequitur.*" Story, Conflict of Laws.¹ And in fact he came here to publish his work. [THE LORD CHANCELLOR.—Do you admit that if he had established himself at Lausanne, without any *animus revertendi*, he would have lost his rights as an Englishman ?] It is not necessary for the purposes of this case to discuss that question. [THE LORD CHANCELLOR.—I do not say whether that is for you or against you, but it does not appear clear to me that a British subject would lose them.] He would not ; for many purposes a British subject may have two domiciles. Another case is that of Voltaire, and it is very strong against the right of a foreigner to copyright. Voltaire, in 1728, published his *Henriade* in England by subscription, the then Queen Caroline standing at the head of the list of subscribers. By the statute, his copyright in that work, if he had any, would not expire till 1756, or later, and he himself lived many years beyond that time. Several other editions were published, even before 1742 ; he was contemporary with those great lawyers who drew up the statute of Anne, and he was the friend of Bolingbroke, yet, with all these

¹ S. 65.

means of asserting his right to exclusive publication, he did not assert it. There can be no doubt that it was supposed he had no lawful claim to copyright, and that these publications were submitted to on that supposition.

[THE LORD CHANCELLOR. — They were submitted to, but not on that supposition. LORD BROUGHAM. — The circulation of the book was in France, and not here; it was printed here to avoid certain difficulties in printing it in France. LORD ST. LEONARDS. — Rousseau's works were printed in Holland for a similar reason.]

* 823 * The doctrine in the case of *Donaldson v. Beckett*,¹ that no copyright in books existed at common law, has been adopted in the United States, in *Wheaton v. Peters*,² which, though not an authority here, is evidence of the opinion which eminent Judges, educated in the English law, entertain on the subject. If the right existed at common law, it must have existed in perpetuity, which no one would pretend. Before the invention of printing, no man thought of having what is now called copyright even in the letters which he wrote. Thus, going back to the times of Rome, we find that the letters which Cicero wrote to Atticus were copied by the scribes of Atticus, and were freely presented by him to the mutual friends of both. Letters or literary compositions, like inventions, when once given to the world, were given without any restrictive right exercised over them by writer or inventor. In the United States it has been deemed necessary to make this matter the subject of a positive law.³ The principles stated by Mr. Thurlow, in his argument in *Tonson v. Collins*,⁴ as to what our law was when that case was argued, are true. He describes literary productions as the result of invention, in the same way as a machine is said to be invented; and consequently if, at common law, the right to literary property existed, and was a right held in perpetuity, then all the useful machines and all the

* 824 * chemical discoveries, as well as all the literary works of great writers, are the property of them and their descendants

¹ 4 Burr. 2408, 2 Brown, P. C. 129.

² 8 Peters, 591.

³ Curtis on Copyright, p. 89: "In the United States manuscripts are now under the protection of the statute of 1831, which gives a remedy at law and in equity against any person who shall print or publish, or be about to publish, any manuscript whatever, without the consent of the author or legal proprietor first obtained, if the author or proprietor be a citizen of or resident in the United States." — Act of Congress, 3 February, 1831, § 9.

⁴ 1 W. Bl. 301–306.

or assignees for ever. It is impossible to distinguish between the two things. This point was well put in the judgment on the case of *Wheaton v. Peters*.¹ There is no trace in the civil law of such a right as to literary compositions ; indeed it seems to have been the other way ; for in the Institutes² it is said, that if Titius wrote a song, or a history, or a speech upon my paper, the paper still belonged to me. Literary property is, in truth, a property in ideas only ; it is not the subject of possession or occupation, and therefore never could have been a subject of a common-law right ; nor could it exist upon general principles of property ; it could only be created by the express provisions of the legislative power. On this point, the argument of Mr. Yates in *Tonson v. Collins*³ is relied on ; this seems also to have been so considered in France : Rénouard.⁴ So that here are the examples of the United States and of France justifying the argument that no copyright existed in an author at common law ; and at all events it is clear that the rights of a foreign author depend, in both those countries, as they must depend everywhere, upon the express provisions of the Legislature alone. The statutes of the United States already quoted prove that proposition as to them : as to France, the work * of M. Rénouard expressly states the fact, that the right of * 825 a foreign author was first given by a decree in 1810.⁵

The words used in the statute of Anne are retrospective. They give to the "author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books," or to the "bookseller, printer, or other person who hath

¹ 8 Peters, 591. Mr. Justice M'Lean, in delivering the opinion of the Court, said (p. 657) : "In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine ? In the production of this, his mind has been as intensely engaged, as long, and, perhaps, as usefully to the public, as any distinguished author in the composition of his book."

² Vinnii Inst. Lib. II. tit. i. § 33, *de Scripturâ*. See the French Code Civil, § 547 et seq.

³ 1 W. Bl. 301. See 333 et seq.

⁴ *Traité des Droits d'Auteurs* (1839).

⁵ Rénouard, *Traité des Droits d'Auteurs* (1839), Part 4, c. 3, § 89, Vol. 2, p. 205. "Does any privilege belong in France to a foreigner who there first publishes his work ?" "Under the law of 1793, which preserved silence on this matter, this question was discussed. It has been formally solved by Article 4 of the Decree of the 5th February, 1810, which assimilates foreign to national authors."

purchased or acquired the copy or copies of any such book, in order to reprint the same" the sole right of printing for 21 years. These words are themselves clear evidences of the belief of the Legislature at that time that no such right previously existed, but that it was then for the first time created. And it is remarkable, that the words of the Act give the right not to any composer of a book, but to the author of a book already printed, which affords further proof that the Legislature did not look on this as an inherent right, but as one which was then conferred. Other sections of that statute also relate to books actually printed. But if it should still be contended that that statute did not create, but only regulated the rights of an author, it follows that the statute was a substitution for the common law, so that all rights of authors must now be taken to depend entirely on its provisions, and if enforceable, can only be so by an exact observance of those provisions. This observation must apply with as much force to the statute of Anne, which regulates copyright in books, as it undoubtedly applies to those which relate to dramatic and musical representations,¹ the right to exclusive profit from which were given * by the Legislature, and must be preserved and enforced in the way directed by the Legislature.

*826 It will be said that this was a personal right of the author, and that such rights are carried everywhere, and are recognised by the laws of all civilized countries, and by that of this country in particular, and *Pisani v. Lawson*² will be relied on. But that case is not an authority for such an argument; there a foreigner, resident abroad, recovered damages in this country for an injury to his character by a publication here. But the character of a man is a property of a purely personal nature; it belongs to him by natural law, and is therefore recognised by the law of every country. But copyright is a special property, which has been already shown to have no existence in the law of nations, but only to exist by force of the municipal law of each particular country: this is well explained in the work of an American author, Curtis on Copyright.³ Assuming it, however, to be a personal privilege,

¹ 3 & 4 Wm. 4, c. 15, 5 & 6 Vict. c. 45.

² 8 Scott, 182, 6 Bing. N. C. 90, 8 Dowl. P. C. 57.

³ Page 22. "The actual law of nations knows no exclusive right of an author to the proceeds of his work, except that which is enforced by the municipal law of his own country, which can operate nowhere but in its own jurisdiction. As

then it is one governed entirely by the domicile of the person who is to take advantage of it, and the law of that domicile cannot alter or affect the law of any other state. The law of the domicile may, as the law of France does, give to an author very peculiar rights, but they will not attach to him elsewhere. Thus, a Frenchman may publish a work in England, and yet, some years afterwards, he or * his children, or their as- * 827 signs, may have the copyright of that work in France. That was the case with Clery's Journal,¹ but no one would pretend that the law of England gives such a right to an Englishman. Publication abroad makes the work *publici juris* here. The difference is explained by the peculiarity of the law of each individual country.

The Engraving Acts² furnish, by analogy, a reason for saying that the object of the Legislature, in the statute of Anne, was to protect and encourage labour and skill in this country, and that the Legislature did not pretend to interfere with any thing that was done abroad, *Page v. Townsend*.³ An Act of Parliament can only be applicable to aliens, or persons out of the dominions of England, by express words. The Bankruptcy Acts and the Stock-jobbing Acts required in that way expressly to be extended to aliens and to foreign funds: they would not otherwise have af-

soon as a copy of a book is landed in any foreign country, all complaint of its republication is, in the absence of a treaty, fruitless, because no means of redress exist, except under the law of the author's own country. It becomes public property, not because the justice of the case is changed by the passage across the sea or a boundary, but because there are no means of enforcing the private right."

¹ Merlin, *Questions de Droit. Contrefaçon*, § vii. Clery had published in London a work, entitled "Journal of what happened in the Tower of the Temple during the Captivity of Louis XVI., King of France." In July, 1814, the two daughters-in-law, and heirs of Clery, assigned to Chaumerot, a bookseller in Paris, the property in the "Journal" of their father-in-law. In September he reprinted it, and made the ordinary declaration then required by the law of France. In June, 1817, Michaud, another bookseller, published a work, entitled "History of the Captivity of Louis XVI., and of the Royal Family, as well at the Tower of the Temple, as at the Conciergerie," in which work was inserted, entire, the "Journal" which was the property of Chaumerot. A proceeding as for piracy was commenced by Chaumerot, and, by the judgment of the Court of Cassation, he succeeded in his suit.

² 8 Geo. 2, c. 13, 17 Geo. 3, c. 57, and see. 7 & 8 Vict. c. 12, and 15 & 16 Vict. c. 12.

³ 5 Simons, 395.

fected either, *Wells v. Porter*.¹ The same observation applies to the Legacy Duty Acts, *The Advocate-General v. Thomson*,²

* 828 to cases of bigamy, anonymous,³ and to *other matters mentioned in argument in the *Sussex Peerage Case*.⁴ Even if it could be maintained, that though an Act may not extend to foreigners by words, it may do so in principle, and that that is the case with these Copyright Acts, and if *Cocks v. Purday*⁵ should be cited as an authority for the proposition, then the answer is, that the exception to any such principle exists in the case of copyright of books; for it is admitted, that if a foreign author first publishes his work abroad, it is, by the law here, *publici juris*, and his subsequent publication of it here cannot, under any circumstances, give him a copyright in this country.

Then, as to the form of the assignment; if Bellini or Ricordi did possess copyright in this country, assignable here, it must have been by virtue of the laws existing in this country, and consequently the forms of those laws must have been observed, in order to make the assignment from the one to the other of them valid. If so, then this assignment is void, as not being attested by two witnesses, *Davidson v. Bohn*,⁶ *Power v. Walker*.⁷

[THE LORD CHANCELLOR. — The assignment is stated in the bill of exceptions to have been validly executed according to the law of Milan. What is the effect of that here?]

It could not be enforced here. The bill of exceptions should have alleged an assignment valid by the law of England. If the argument that the right exists under our law of copyright is well founded, then the assignment comes within the principles of our law, which having created it must govern its enjoyment; it must be executed in the form required by the law of this country, and it must also be alleged to have been so executed. It was not so

executed, but was executed according to the law of Milan,
* 829 * and therefore did not vest any property in Ricordi which the law of England can recognise.

Another point arising on the bill of exceptions is, that it does not there appear that it was ever the intention of Bellini to pass

¹ 3 Scott, 141, 2 Hodges, 78. See *Elsworth v. Cole*, 2 M. & W. 31.

² 12 Clark & F. 1.

⁴ 5 C. B. 860.

³ 1 Sid. 171.

⁵ 6 C. B. 456.

⁶ 11 Clark & F. 136.

⁷ 3 Maule & S. 7. See also *Clementi v. Walker*, 2 B. & C. 861.

an English copyright at all. It is merely alleged that by the law of Milan he was entitled to copyright, and that by that law he assigned to Ricordi his interest in such copyright, and the right of transferring the same. But all that is so stated refers to the law of Milan alone, and, for any thing that appears in the bill of exceptions, the only agreement was, that Ricordi should possess in Milan the rights which Bellini possessed there; not that Bellini pretended to give, or Ricordi to purchase, all the rights which Bellini himself might, by possibility, be entitled to claim elsewhere.

Lastly, English copyright extends all over the British dominions; 54 Geo. 3, c. 156; is an indivisible thing, and part of it alone cannot be assigned. *Davidson v. Bohn.*¹ Here the assignment was only made for the United Kingdom, and therefore, being only an assignment of part of the right which Ricordi professed to have received by transfer from Bellini, was bad.

Sir F. Kelly and *Mr. Bovill* (*Mr. Raymond* was with them) for the defendant in error.—The construction here sought to be given to the statute of Anne can only be given by introducing the qualifying words, “British-born subjects,” or “subjects of Great Britain,” the introduction of which would occasion confusion and injustice, and would have this operation, that a foreigner who should come here permanently to reside, and should then become the author of an immortal work, would be refused a title to copyright. Such a consequence, though * implied in the * 830 judgment of the Court of Exchequer in *Boosey v. Purday*,² certainly never was intended, and yet it follows necessarily, from the argument, that the statute of Anne applies only to British-born subjects.

The argument on the other side, founded on the principle that no act of the British Legislature can have any extra-territorial force, is fully admitted; but the consequence deduced from it does not follow. The moment that a person or a thing, which can be the subject of English law, is found in this country, the law operates upon each, whether of foreign or English origin, and Story, who is relied on by the other side, is himself the decisive authority for this proposition.³

¹ 6 C. B. 456, per Maule J. 458.

² Conflict of Laws, § 18.

³ 4 Exch. 145.

[THE LORD CHANCELLOR. — The question here is not of an international kind, but is whether, under the circumstances of this case, the statute of Anne has secured to the assignee a copyright property.]

It must be assumed, as stated in the special verdict, that Ricordi came here clothed with all the rights which the law of Milan could give him in his own country. Of what value are those rights here is now the question. It is submitted that the moment Ricordi arrived here, he stood in the same situation as the foreign author himself. He brought with him something which our law recognises as property, and there is no distinction between property in the hands of an alien and in the hands of a British subject. The law of this country came into operation both upon his person and his property ; and Ricordi being, for the purposes of our law, the author, and being present in this country, had the right of exclusive publication of his work, and could assign that right to any other person in this country. If the musical composition had been surreptitiously obtained from Ricordi, and republished, the

* 831 Court * of Chancery would have afforded him protection.

The protection of our law cannot be confined to the mere substantive property of the foreigner, but extends to all his personal rights.¹ Property in a patent may be held in trust for a foreigner, *Beard v. Egerton*.² If Ricordi had brought pictures here, no one could say that the pictures would be protected from injury, but that he himself had no legal right to deal with those pictures as his property. Our law, indeed, not only protects him and his property while here, but it so fully recognises his personal rights, that it protects his character, as property, even while he is abroad, and when he has never been in the country, *Pisani v. Lawson*.³ The plaintiff, there, though a foreigner, resident abroad, and who had never been in this country, was allowed to maintain an action for compensation in damages for an injury done to his character by a publication in this country. If the form of the action for libel had been regulated by an Act of Parliament, and not by the common law, his right to claim damages would still have been the same, for the right was a personal right, existing by force of the common law. In like manner, the sole right to multiply books is a personal right, though it relates to property. It is

¹ Bro. Abr. Denizen and Alien, pl. 10. Anonymous, Dyer, 2 b.

² 8 C. B. 97.

³ 8 Scott, 182, 6 Bing. N. C. 90.

the same as the exclusive right to sell a watch manufactured by a foreigner in a particular way, and first brought over to this country by its owner. It is not because the forms of enforcing the right may be different in our country from what they are in another, that therefore the right itself does not exist. Take the analogy of bills of exchange ; they are not presentable on certain days in Milan ; but if a Milan bill of exchange is brought here, the law of England attaches upon it ; it becomes presentable according to the law of this country, the rights of * the holder * 832 here being quite unaffected by that difference of law in England and Milan, which is in fact a mere matter of regulation.

The question arises here whether copyright existed in this country before the statute of Anne. That it did so, is shown by the case of *Roper v. Streater*,¹ although, of course, that question is not very material, since the right of the defendant in error must now be regulated by that statute ; but still it is of some importance, as leading to a conclusion as to what was the intention of the Legislature in passing that statute, and what was the state of the law on which that statute was to operate. That statute was avowedly passed for the encouragement of learning.

[LORD BROUGHAM.—Do you read it thus,— for the encouragement of learning all over the world ?]

No. But whoever possesses and uses learning here, to that man the statute applies, if he gives this country the benefit of its first production. Is it not for the benefit of learning here, that French, Italian, and German authors should first publish their works in this country ? If it had been the intention to exclude a numerous and distinguished class of men from the benefit of the Act, why could not a few simple words have been introduced, which would have left the matter free from all doubt. That they were not so introduced is strong evidence to show that no such exclusion was intended. In the statute there is no limitation of persons ; the words are, “ the author and his assigns.”

[LORD BROUGHAM.—In former times were Irish editions of English books imported into this country, on being proceeded against as piracies ?]

Nothing is known on that subject. But that question itself shows the dangerous consequence of constructively introducing into a statute words which may have the effect * of * 833

¹ Skin. 234, referred to in 4 Burr. 2316.

giving a peculiar meaning to certain of its provisions. The words in the statute are, "any author of any book," which must mean every author of every book. What is the difference, as to any principle of justice, between a book, a picture, and a machine? Suppose these words had been, not "the author of any book," but "the projector, inventor, maker, or manufacturer of any machine hereafter to be invented and manufactured"; would or would not those words apply to foreigners? If they would, why will not those now in the statute apply to authors?

[THE LORD CHANCELLOR.—A picture is analogous to a manuscript; but a picture cannot be indefinitely multiplied. In order to resemble the printing of a book, your analogy must be confined to things that can be so multiplied; an engraving would be the same as a book; but that is arguing *idem per idem*.]

The right of property in the book is the first thing to be established; that being admitted, then the other right, that of exclusively multiplying copies, grows out of it. What are the analogies furnished by other statutes? take the Patent Acts; the words are, "The first and true inventors of such manufacture." What is the distinction for such a purpose between the author of a book, or the man who first publishes it, and the inventor of a machine, or the man who first introduces it into use? it is the first publication of the book, or the first use of the machine, which gives the right. Why not confine one, as well as the other, to British subjects? but that is never done; nor, with regard to patented manufactures, has it ever been said that the foreign inventor must, in order to have the benefit of the statute, be domiciled in this country.

[LORD ST. LEONARDS.—Assume that the common law gave the right; that right, whatever it was, was taken away by the statute of Anne, and certain privileges, not before existing, *834 * were then given. But assuming copyright to exist at common law, would you say that the common law applied to foreigners?]

If the right existed at common law, every one, whether foreigner or native, would be entitled to the benefit of it, when either the man, or the property which was the subject of that law, was in this country: it was a right attaching on the property; and as soon as the property was here, the law operated upon it.

[THE LORD CHANCELLOR.—Assuming that to be so; suppose

the composition of Bellini sent by him to Boosey, and first published by Boosey, and then pirated, who would be the person to complain of the piracy, Bellini or Boosey ?]

Boosey, who was the owner of the right by purchase ; the right attaches on the property ; the man, the creator of the property, is not required to be resident here. Byron wrote many of his works abroad ; Murray bought them ; the copyright was in Murray.

[THE LORD CHANCELLOR. — Do those who maintain that there was a common-law right say that that right was capable of transfer ; if so, what was the form of transfer at common law ?]

There might, perhaps, be some difficulty about the form of the transfer ; but the right to transfer existed ; then the form of making it would be analogous to what was used with relation to other things.

[THE LORD CHANCELLOR. — Is there an instance of property of this sort being claimed before the statute of Anne ?]

All the cases, from the earliest times, show that there existed in the author of any work, and in the purchaser from the author, an absolute right of property, *Roper v. Streater*.¹ An anonymous case, referred to in the * *Stationers' Company v. Seymour*,² the *Duke of Queensberry v. Shebbeare*,³ and *Prince Albert v. Strange*,⁴ and in some, especially the last of these cases, the existence of that property was recognised altogether independently of any intention to publish. An alien friend possesses this right as much as a British subject. There is nothing in the terms of the statute which expressly limits the right to a British subject ; that was assumed and determined for more than a century. There is only one case which really raises a doubt upon the subject. Take the cases that appear to be opposed to the right, and it will be found that they are so in appearance only. In *Delondre v. Shaw*,⁵ protection was refused to a medicine manufactured abroad, and a label printed abroad ; but the ground of the decision there was, that the plaintiff had no interest except in the copyright of the printed seal, and that was something which was printed and published abroad, and was therefore not the subject of the copyright by the law of this country. The second marginal note in that case misleads the reader, and Lord Chief Justice Wilde, in

¹ Skin. 234, 4 Burr. 2316.

⁴ 1 Macn. & G. 25, 1 Hall & Twells, 1.

² 1 Mod. 257.

⁵ 2 Simons, 237.

³ 2 Eden, 329, 4 Burr. 2330.

Cocks v. Purday, commenting on the dictum which is repeated in that note, says:¹ "If this dictum was intended to apply to foreign authors who have not published in this country, it does not apply to the present case; if it was intended to apply to a foreign author who has published his work here, the same learned Judge, in *Bentley v. Foster*,² where the point was raised, expressed a deliberate opinion in opposition to that which he had before thrown out." *Page v. Townsend*³ is the next case, and that merely

* 836 decided that prints engraved and struck * off abroad, but

published here, were not protected from piracy; but that was because of the express words contained in the 17th Geo. 3, c. 57. Then came *Chappell v. Purday*,⁴ and there again the question did not properly arise, for the overtury sought to be made copyright was first published on the Continent. *Boosey v. Purday*,⁵ which is the last of these cases, is the only one in point against the defendant in error.

[THE LORD CHANCELLOR.—The arguments of the Judges in that case may be commented on without reserve; for that case is not a direct authority, since the action, in the present case, was commenced, and the case was brought to this House finally to determine the question which was there decided.]

If so, then there is no authority whatever for the proposition that copyright does not exist in the work of a foreign author first published by him in England. Then what are the reasons given for the judgment which denies his right? It is there said⁶ that the object of the Legislature was not to encourage the first publication of foreign books in this country, but the cultivation of the intellect of its own subjects, to "encourage learned men to compose and write useful books," as if the first publication here of learned works composed by anybody would not have that effect; and the reward is stated to be "the monopoly of their works for a certain period, dating from their first publication," as if that reward would not be secured to them, whatever was the cause which stimulated them to write, whether the desire to enforce or to oppose the opinions of a native or of a foreign author. In these two assertions, which do not amount to reasoning, lies the whole pith of that judgment. On the other side, there are numerous

¹ 5 C. B. 883.

⁴ 14 M. & W. 303.

² 10 Simons, 329.

⁵ 4 Exch. 145.

³ 5 Simons, 395.

⁶ 4 Exch. 157.

* and well-considered authorities to the effect that the works * 837 of a foreigner first published in this country thereby obtain copyright: *Bach v. Longman*¹ is the first of them. There the question was, whether a musical composition was a book within the statute of Anne? a question that never could have arisen if the works of a foreigner had not been deemed entitled to protection under that statute.

[THE LORD CHANCELLOR.—That foreigner was resident in this country at the time of publication, and had obtained letters patent for his publication.]

That was so, and the case therefore shows that, both as to the statutes of James and Anne, a foreigner was not, as such, excluded from their benefit. Then came the case of *Tonson v. Collins*.² There the question of copyright was carefully considered, and even Mr. Thurlow, in arguing against it, admitted³ that “it is of no consequence whether the author is a natural-born subject, because this right of property, if any, is personal, and may be acquired by aliens.” The point was not absolutely decided in that case; but it is clear that it was discussed and considered. So matters remained till the case of *Clementi v. Walker*,⁴ where the decision come to could not have occurred if the fact of the author being a foreigner had been an answer to the claim. That it was not so is proved by *Guichard v. Mori*,⁵ where Lord Chancellor Brougham refused an injunction, because, in fact, there had been a publication abroad before there was any publication in this country; but at the same time his Lordship said: “The policy of our law recognises by statutes, express in their wording, that the importation of foreign * inventions * 838 shall be encouraged in the same manner as the inventions made in this country, and by natives. This is founded as well upon reason, sense, and justice, as it is upon policy.” That case was twice before the Vice-Chancellor, and once before the Lord Chancellor; so that the question thus referred to must have been fully considered; and the fact of the party being a foreigner must have been deemed not to be an answer to the application, otherwise all the other discussion might have been saved. Then came the case of *Bentley v. Foster*.⁶ There the Judge was Vice-Chan-

¹ Cowp. 623.

⁴ 2 B. & C. 861.

² 1 W. Bl. 301 – 321.

⁵ 9 Law J. Ch. (1831) 227.

³ 1 W. Bl. 306.

⁶ 10 Simons, 329.

cellor Shadwell, and his dictum in *Delondre v. Shaw* was cited to him ; but he held that “ protection was given, by the law of copyright, to a work first published in this country, whether it was written abroad by a foreigner or not.” As the question, however, was a legal one, he directed an action, which was brought, and the defendant, without further contesting the right of the plaintiff, consented to a verdict. In *D'Almaine v. Boosey*,¹ it was held that the English assignee of the copyright of a foreign musical composer was within the protection of the statute, and thus in all these cases the right was admitted and acted on. The case of *Cocks v. Purday*² was the next.

[THE LORD CHANCELLOR.—The point as to publication abroad is put too broadly there.]

But still the general rule is clearly stated, that an alien may acquire personal rights here with respect to property in this country. If that is a fixed principle of the law, why should a book alone constitute the exception to it ? A foreigner may maintain

an action for property here, and even for an injury to his
 *839 reputation ; *Pisani v. Lawson* ;³ * and *Boosey v. Davidson*⁴ fully recognised the right of a foreigner to copyright in this country, on the sole condition of first publication here, while *Ollendorf v. Black*⁵ decided that a foreigner, who was a mere temporary resident in England, was entitled to the usual injunction, if his work was pirated.

Then as to the question of assignment. It is not contended that what was done in Milan was of itself valid here ; but that what was done there, vested complete legal rights in Ricordi ; he came to this country fully entitled, as the author would have been, to publish, or to withhold publication. Having here the rights of the author, he transferred them to Boosey by forms valid according to the law of this country. Now the law of England operates only on persons, things, and acts in this country : the property being here, our law will not inquire whether it was acquired abroad by forms such as are familiar to the law of England. If it was validly acquired there, it is protected here, and the bill of exceptions states it to have been so acquired. Besides which, the statute of Anne refers to assignment after publication, and it has never been decided that

¹ 1 Younge & C. Exch. 288.

⁴ 13 Q. B. 257.

² 5 C. B. 860.

⁵ 20 Law J. N. S. Ch. 165.

³ 6 Bing. N. C. 90, 8 Scott, 182, 8 Dowl. P. C. 57.

an assignment by an author made before publication, must be attested by two witnesses.

[THE LORD CHANCELLOR.—There is no doubt about the general principle, that property may be transferred according to the law of the place where the transfer is made; but here is a peculiar property, the creature of a particular statute: then the question is, whether that can be transferred at Milan, so as to give, to an assignee there, all the rights which an author alone could enjoy here under the provisions of the statute which created the property.]

* It is admitted that the forms of the statute must be * 840 observed; but that is only in this country; and if the statute had said that no property should pass from the author, wherever he resided, except by an instrument attested by two witnesses, then, though contrary to general principles, such an enactment must have full effect. But the Act here does not say so; it does not even refer to an assignment before publication; and the Statute 54 Geo. 3, c. 156, does not require witnesses at all, but only a contract in writing, which certainly was given here. The statement that this property is entirely the creature of statute is not admitted. The property does not differ from any other property. All that has to be determined here is, whether the man here is in possession of the property here? If he is, the law operates on both, and the Court has nothing to do with the form by which he became possessed of it at Milan. Ricordi had purchased it; he had it here, and he assigned it by the laws of this country, which laws can only operate on the assignment that took place in this country.

It is not correct to say that this was an assignment, not of English, but of Austrian copyright only. It was an assignment of all that Ricordi possessed in this country, and that was the exclusive right of publication here. The Legislature gives the privilege of copyright to the first publisher; it is his reward for first publication. The composition was first published here by Boosey. No other person could have had the copyright. He purchased from Ricordi all the rights which Ricordi possessed, and he observed all the forms which the law requires to be observed, in order to give effect to them.

As to the last objection, that this was only an assignment of a part of the copyright, it is clear that it was an assignment of

* 841 the whole right which Ricordi possessed here, and * which was secured by English laws, or could be transferred under their authority.

Mr. Serjeant Byles, in reply.—The benefit of the statute of Anne, if meant to be given to foreign authors, was given only to such as should, at the time of publication, be domiciled in this country.

This case is not like that of a watch, or a picture, brought to this country ; for in each of those cases there would be substantive property in possession ; here the claim is one of a right, which does not depend on universal principles of law, but is entirely the creature of statute. The case of *Roper v. Streater*¹ is very loosely reported, and cannot at all be relied on ; besides which, the author, and the person who purchased from him, were both Englishmen. There is no analogy between the patent law and the copyright law. The former expressly gives the right to the “first or true inventor,” without restricting the expression in any way ; but in the Copyright Act the importer of a book, already printed abroad, such as the 7th section refers to, is the only person who answers to the inventor, and there is no doubt that the first importer of a book published abroad would not have copyright in it here, except he could bring himself within the International Copyright Acts.

THE LORD CHANCELLOR.—I think your Lordships will concur with me, that although this case itself relates only to something of extremely small value, namely, the copyright of a part only of a particular opera, yet that the question is of the very greatest importance, and therefore you will not regret that the argument

has occupied a considerable portion of time. As we have * 842 had the assistance * of the learned Judges, and shall have the benefit of their opinion upon this case, I shall abstain, studiously and purposely, from making any observations as to the impression which the arguments have made upon my mind. I will merely call your attention to the fact, that the case comes before this House upon a writ of error, from a bill of exceptions, in the case of *Boosey v. Jefferys*. I myself was the presiding Judge at the time that case was tried ; but as far as relates to myself, I ruled it in conformity (as I was bound to do, whether right or

¹ Skin. 234.

wrong) to what had been previously decided by the Court of Exchequer. In truth, it was almost agreed that that course should be taken, as it was impossible to bring the case of *Boosey v. Purday* to this House on the then state of the record. This action of *Boosey v. Jefferys*, as it stood below, was therefore brought in order that the matter might come by way of appeal to this House. That there are conflicting authorities upon this subject is a matter beyond doubt; they are not very numerous, and, none very distinctly applying to this particular point, it was thought extremely fit that the matter should be brought before your Lordships as the Court of ultimate resort.

What I propose, under these circumstances, is, that certain questions, which appear to me to exhaust the case, shall be submitted to the learned Judges. In the first place, Whether the statute of Anne, or the common law, as far as the statute enforced it, with reference to copyright, extends to foreigners while domiciled and living abroad, and there composing their works? Whether foreigners, under such circumstances, can confer upon any person in this country a copyright against others of her Majesty's subjects? Supposing they cannot do so under any circumstances, nothing further is to be discussed; but if that can be done under any circumstances, then there * will * 843 arise a number of minor questions. Whether an author can assign, by the laws of his own country, something that shall give a right in his own country to the assignee there, so as to enable that assignee to transfer his right to this country, the assignee not being called, under any circumstances, the author; he is the assignee of the author, and not the author himself? Whether or not an assignment can be made in the mode in which this assignment purports to have been made, that is, to give a right not to a copyright generally, but only to a copyright limited to a particular district of the world, namely, this country? There are certain other minor points which will arise, but which, I think, will be exhausted by the questions which I shall propose to be submitted to the learned Judges. If your Lordships concur, I propose that this statement should be made to the learned Judges, with the questions, for their opinions.

"Firstly, Vincenzo Bellini, being an alien friend, while living at Milan, composed a literary work, in which, by the laws there in force, he had a certain copyright." I purposely propose it in that

form, because no evidence has been offered with reference to the extent of copyright at Milan, and therefore I know nothing about it. "He there, on the 19th of February, 1831" (it is necessary to state the dates, in order to show to what statutes the attention of the learned Judges must be directed), "by an instrument in writing, bearing date on that day, not executed in the presence of or attested by two witnesses, made an assignment of that copyright to Giovanni Ricordi, which assignment was valid by the laws there in force. Ricordi afterwards came to this country, and on the 9th of June, 1831, by a deed under his hand and seal, bearing date on that day, executed by him in the presence of and attested by two witnesses" — I need not point out to your

* 844 * Lordships the circumstance of the absence of the witnesses in the one case, and the presence of the witnesses in the other ; I advert to it in order to raise the question, Whether the statute of Anne, which requires two witnesses, extended, or did not extend, to an assignment, which was valid by the laws of the country where it was made, but which was made according to the laws of that country alone, and had not two witnesses, as required in this country — "for a valuable consideration, assigned the copyright in the said work to the defendant in error, his executors, administrators, and assigns, but for publication in the United Kingdom only. The said defendant then printed and published the work in this country before any publication abroad. The plaintiff in error, without any license from the defendant in error, then printed and published the same work in this country. Did this publication by the said plaintiff give to the said defendant any right of action against him ? "

"Secondly." I propose to ask the learned Judges, "If the assignment to Ricordi had been made by deed, under the hand and seal of Bellini, attested by two witnesses, would that have made any, and what difference ? " That is, if the assignment, which was valid according to the laws of Milan, had been also valid according to the exigency of the statute of Anne, would that have made any difference ?

"Thirdly. If Bellini, instead of assigning to Ricordi, had, while living at Milan, assigned to the defendant in error all his copyright, by deed, similar in all respects to that executed by Ricordi, would that have made any and what difference ? " This question is for the purpose of obtaining the opinion of the learned Judges

(supposing they should think that the intermediate possession by Ricordi, who was also an alien, did affect the question) as to what would have been the case if the foreign author had himself assigned ?

*“ Fourthly. If the work had been printed and published * 845 at Milan, before the assignment to the defendant, would that have made any, and what difference ? ” That question, my Lords, perhaps does not actually and of necessity arise in the present case ; but it may be as well that the subject should be exhausted, because many arguments have been pressed as to whether or not publication abroad is the making a matter *publici juris*, and whether that has any, and what bearing upon the case. I therefore propose to ask the learned Judges whether it would have made any difference if the work had been published at Milan first, before the assignment ?

“ Fifthly. If the work had been printed and published at Milan, after the assignment to the defendant, but before any publication in this country, would that have made any, and what difference ? ”

“ Sixthly. If the assignment to the defendant had not contained the limitation as to publication in this country, would that have made any, and what difference ? ”

“ Lastly. Looking to the record as set out in the bill of exceptions, was the learned Judge who tried the cause right in directing the jury to find a verdict for the defendant ? ” I propose, with your Lordships’ concurrence, that these questions be submitted to the learned Judges.

LORD BROUGHAM. — My Lords, I entirely agree with my noble and learned friend in the view which he has taken of this case, and also in the propriety of our abstaining from indicating in any way any impression which has been made upon us by the arguments of the learned counsel. I think these questions, which are proposed to be put to the learned Judges, will exhaust the subject.

THE LORD CHANCELLOR. — My noble and learned friend on my right suggests to me to add to the words, “ a certain * copyright,” the words, “ the nature and extent of which * 846 did not appear.”¹

¹ This, however, was not ultimately done. See Judges’ Opinions.

June 29.

MR. JUSTICE CROMPTON. — The answers to the questions proposed by your Lordships in this case seem to me entirely to depend upon the construction to be put upon the statutes relating to copyright in this kingdom. And I do not think it necessary to enter into the question as to the effect which the decision of this case may have upon our literary relations with other countries. Nor does it appear to me at all necessary to enter into the much-disputed question, as to whether the statute of Anne created a new right, or was an abridgment of an old one. Whatever was its origin, the right must now, I think, be taken to exist only as bounded and regulated by that and the subsequent statutes, and for the term, "and no longer" (to use the phrase of the statute) than mentioned herein, according to the words of Lord Kenyon, in *Beckford v. Hood*,¹ when speaking of the result of the discussion which terminated in the decision of this House in the great copyright case of *Donaldson v. Beckett*;² "but the other opinion finally prevailed, which established that the right was confined to the times limited by the Act of Parliament."

It is not necessary either to consider the question as to the rights of an author as against parties having illegally or surreptitiously taken or used his manuscript or copies. Such rights must not be confounded with the copyright now under discussion, the creation of or limited by the statutes.

* 847 * It was not disputed at the Bar, and may be assumed also, that copyright, being a monopoly, or right of excluding persons from publishing in this kingdom, is local in its nature, and has no extra-territorial force. It is the creation of our municipal law, and to be acquired only in the manner and by the persons pointed out by that law, and is not a property derived or carried out of any general right of property or foreign copyright. It will be necessary, therefore, to consider by whom, and in what manner, a right to copyright, in this country, can be acquired or become vested, according to the statutes of copyright.

By those statutes, the monopoly is vested in the author or his assigns, for the limited term after first publication. This first publication is the commencement and foundation of the right, the terminus à quo the period of the existence of the right is to run, and a condition precedent to the existence of the right.

¹ 7 T. R. 620-627.² 4 Burr. 2408, 2 Brown, P. C. 129.

In *Beckford v. Hood*, which I have before referred to, and which was decided not very long after the great case in the House of Lords, the declaration averred the infringement as being within the period after the first publication ; and Lord Kenyon, in saying that it was established that the right was confined to the times limited by the statute, in effect, treated the act of first publication, from which such time was to run, as a condition precedent to the existence of the right.

It was held in *Clementi v. Walker*,¹ on perfectly satisfactory grounds, as is plainly to be collected from the statute, that by the first publication is meant a publication in this kingdom, — and the main question in the present case is, whether the right to acquire the monopoly by a *bona fide* first publication here, is confined to persons who *are British subjects either by birth *848 or Act of Parliament, or as owing temporary allegiance here by virtue of their residence in this country. In *Clementi v. Walker* no such restriction as is now contended for appears to have at all entered into the contemplation of either the Bar or the Court. Such a doctrine would have been at once decisive of the cause, and would have rendered it unnecessary for the Judges to consider the question on which they decided. In deciding that a prior publication abroad by a foreign author, not followed up by a publication here in a reasonable time, destroyed any right in the foreign author, and in doubting what would be the effect of such prior publication abroad, if followed up by a publication here within a reasonable time, the Court of King's Bench seems rather to have recognised the general right of a foreign author to become the first publisher here within the statutes, than to have supposed such right to be confined to British authors publishing here. It seems admitted that an alien amy, residing here under the protection of, and subject to our laws, would be a person entitled to publish his works so as to entitle himself to a monopoly ; and it is not pretended that a residence abroad by an English subject, or the fact of the work having been composed abroad, either by an Englishman or a foreigner, would have the effect of preventing the author from acquiring a copyright. It is said, however, that the party to acquire a copyright must be, when he publishes, a British subject by birth or by residence here. According to this argument, a foreigner residing at Calais, and composing a

¹ 2 B. & C. 861.

work there upon an English subject, and for the English reading market, could not write to his agent in London to publish it so as to acquire copyright, but might acquire it by crossing to Dover,

and sending his work from that place to be published in

* 849 London during his stay in this country. The *only words

in the statute from which any such intention as is contended for can be supposed to be implied, are in that part of the preamble which speaks of the detriment to the authors and proprietors, and the ruin of their families, and of the encouragement to learned men to compose and write. I cannot think that these words evince a sufficiently strong intention to confine the benefits of the statute to authors who are British subjects by birth or residence ; and I do not find any thing which is sufficiently clear to satisfy me that the Legislature has expressed any intention to restrict the protection given, further than as decided in the case of *Clementi v. Walker*, that the statute must be considered as legislating upon what is really a British publication ; and I think that, provided the publication is really and *bondā fide* British, the copyright may be acquired, although the author is foreign, although he resides abroad, and although he does not personally come to England to publish. I come to this opinion on the words of the statute, vesting the right in the authors or their assigns from the first publication ; and from not finding any thing in the Acts to exclude friendly foreigners from its advantage. Works of a foreign author so published, seem to me within the clauses requiring the delivery of copies to our public institutions. If the statute is to be read as if the word "British" was inserted before the word "author," it would seem also necessary to insert it before the word "assigns," for otherwise a British author could not by assignment give to a foreigner the right of publishing under the statute ; such foreigner could not pass any right even to a British subject, and there would be created by the statute a species of personal property which an alien friend would be incapacitated from taking, contrary to the general rule of law. I am unwilling

to introduce words into an Act of Parliament, without

* 850 being able to see a manifest *intention of the Legislature much more clearly than I can do in this case.

If it should be said, Why is the publication to be construed to mean a British publication, and the author not to be construed a British author, and the composition a British composition ? the

answer seems to me to be, that the publication being made the commencement of the term from which the monopoly is to run, and that publication giving rights confined to Britain, and the enactments as to the entry at Stationers' Hall before the rights as to the penalties were to attach, and the obligation imposed of delivering copies to British Institutions, together with the authority of *Clementi v. Walker*, satisfactorily show that the publication must be intended to be in England, whilst there seems nothing in the Act to show that the Legislature in using the words "authors" and "assigns" had any intention of making any restriction as to the place of composition, or as to any personal capacity of the author or assignee. I am by no means satisfied that if the case had occurred to the Legislature of a foreigner composing a work for the English market in France, and sending it over to be really and *bond fide* published here, such a work would have been excluded from the benefits and obligations of the Act. There is no authority until the one now under discussion to show that such is the construction of the statute; and taking the authorities altogether, they are, upon the whole, more against than in favour of such a construction. And though the balance of authority may not perhaps be so much in favour of the right as to prevent a Court of Error from taking a contrary view, that balance is certainly in favour of the decision of the Exchequer Chamber. And it seems probable that the present objection, if good, would have been taken in cases which neither Judges nor counsel have thought worth raising.

* It is said that the Legislature must be supposed to have *851 contemplated English authors and English assignees. An argument of this nature was pressed with much greater ground, as it appears to me, but without success, in a class of cases which arose as to the construction of the statute passed in the same reign as the Copyright Act of Queen Anne, to give a right of action upon promissory notes, and to make them indorsable. The statute saying that such notes shall have the force of inland bills, and shall be indorsable like inland bills, it was argued, as here, that the Legislature must be intended to have been legislating about English notes and English indorsements, and this argument was considerably strengthened by the statute using the words "as in the case of inland bills," from which there might be reason to suppose that the Legislature was speaking of a subject matter in Eng-

in the next month, the Statute of 54 Geo. 3, c. 156, was passed, which makes the consent in writing necessary, but does not require any attestation. This seems to have been an intentional alteration of the law. The case of *Power v. Walker* must be taken as establishing that the construction of the statute of Anne is, that as the license or consent of the proprietor is to be by writing, attested by two witnesses, the assignment, which is a greater thing, must also, *à fortiori*, have been intended to be by writing attested by two witnesses. I will not stop to inquire how far such a doctrine, if now propounded for the first time, might or might not be satisfactory. But when the Legislature, immediately after the decision, re-enacted the same provision in the same words as to publishing without consent in writing, but omitted the provision making the attestation by two witnesses necessary, I think that the same construction leads to the conclusion that the assignment need not now be attested. It would be impossible to say that the action on the case mentioned in the 54th Geo. 3 would lie, or that an action for the penalties could be maintained since that statute, if there had been the assent of the author in writing, although not attested, and I think that the necessity for an assignment in writing attested by two witnesses, which arose only from the construction put upon the words of that provision of the statute of Anne, was put an end to by the 54th Geo. 3, c. 156, and that the assignment need now only be in writing. I should observe, that the 54th Geo. 3, was not referred to in the case of *Davidson v. Bohn*, which appears to me properly decided according to the authority of *Power v. Walker*, as to the publication where there was no assignment in writing, but not to

*855 have been right, owing *to the 54th Geo. 3, not having been brought to the notice of the Court, as to the publication assigned in writing, but without the attestation required by the statute of Anne, but not required, as I think, by the 54th Geo. 3.

The conclusion, therefore, at which I arrive, is, that an author being an alien amy may acquire a copyright here if he first publishes here, though he is not personally here, provided that his first publication here is prior to any publication abroad, although he does not himself bring over his work either in manuscript or in his head. And that, under the same restriction, a foreign assignee of such foreign author may acquire a copyright here, if he is an assignee under an assignment executed according to

the provisions of our statutes regulating such assignments. I should add, in reference to the answers which I shall have to give to some of the questions proposed by your Lordships, that the assignment must be such as will in its terms comprehend the English copyright in question.

I have now to apply the conclusions at which I have arrived to the questions proposed by your Lordships in detail.

To the first of your Lordships' questions I answer, that, although, on the state of facts assumed, Bellini appears to me an author who might have sent his work over here for first publication, yet that it does not sufficiently appear that there was any sufficient assignment of his right to publish, so as to obtain English copyright. It is stated with reference to the first question that Bellini had, by the law of Milan, a right to a certain copyright, by which I understand some copyright in a foreign country to be enjoyed there according to the law of the country; but to what extent or for what time does not appear. And it is stated that the assignment was of that copyright. As I conceive Bellini's right to clothe himself with the English monopoly *arose from his authorship, and not at all as being parcel *856 of or carved out of any foreign copyright, I do not see how an assignment stated to be of foreign copyright can pass a right under the English statutes. On the supposition, then, that the assignment maintained in this first question is intended by your Lordships to apply to the foreign copyright solely, I answer in the negative, on the ground that the assignment referred to in that question does not appear to be an assignment of any English right.

Secondly. If the assignment by Bellini had been by deed attested by two witnesses, I do not think that the defect in the title would be cured, as the assignment is stated to have been of the foreign copyright, and does not appear to have included any other right.

Thirdly. I think if Bellini had assigned either to Ricordi, or immediately to the defendant in error, by deed, similar in all respects to that executed by Ricordi, and therefore comprising and assigning the right as to this country, that the defendant in error would have had a good title to the copyright.

Fourthly. I think that if the work had been printed and published at Milan before the assignment, the right to publish in

England, so as to acquire the English copyright, would have been lost.

Fifthly. I think that the same consequence would have ensued if the publication at Milan had been made after the assignment, but before the publication in England. There would have been nothing in the assignment of the English copyright to prevent the publication at Milan, and that publication not giving the monopoly in England would, I think, make it lawful to publish the foreign work in England. And if once lawful for any one to publish, I think that the right of acquiring English copyright in the work is gone.

* 857 * Sixthly. In the view which I take of the right of the author and the assignee, the limitation of the right to be exercised in this country does not appear to me to be material. It was suggested in argument that if the right was an entire right, it could not be divided, so, for instance, as to make an assignment of English copyright to one person for Yorkshire, and to another for Middlesex; and I think that in such case there would be great difficulty. In such a case as the present, however, I regard the right of the author to the English copyright as an entire thing under our municipal statutes; and as not being parcel of or derived out of any thing else. I look upon the author as having this right, if at all, as the author; and not as having the copyright by the laws of Milan. And he having that entire thing under our own law, if by assignment he passes that right as to this country, there is no subdivision or limitation of the copyright, unless, indeed, the matter which has been brought under my notice to-day for the first time as to the Statute 54 Geo. 3, extending the privilege to all the British dominions, may make a difference in this respect.

Lastly. In answering this question I must call your Lordships' attention to the mode in which the question arises upon the record, and to the peculiar position of the parties as to the proof required by the enactment of the 5th & 6th Vict. c. 45, § 11. The question upon this record arose upon a bill of exceptions to the ruling of the learned Judge directing a verdict for the defendant below. The section to which I refer made the copy of the entry produced *prima facie* evidence of the title of the plaintiff. He was therefore entitled by such evidence to the verdict, unless the *prima facie* title given by the statute was destroyed by the defendant's

evidence. If the supposed defect in the title * depended * 858 only upon the form or nature of the assignment produced, the plaintiff's *prima facie* title under the statute may not be so entirely destroyed as to warrant the direction to the jury that the finding must be for the defendant; as though the proof of such defective assignment without evidence of any other might be strong and cogent proof for the jury that there was no other; yet as it is not found that there was no other, there would be evidence both ways for the jury, and the direction to the jurors can only be supported if there was no evidence for their consideration. As to the supposed defect on the ground of the author being an alien, and not having been in this country; as that fact is directly negatived, the defect, if available, would directly negative the title of the plaintiff, and the direction of the learned Judge to find for the defendant would be right. As I think that, under the circumstances stated in the record, the title might be gained by the foreign author or his assignee, and that an assignment in writing, though without witnesses, would be sufficient; and as the assignment in question, though ambiguously stated in the bill of exceptions, may have been sufficiently general to pass to the assignee the right of clothing himself with the English copyright (as I should suppose from the recital of it in the deed to the plaintiff it really was in point of fact), and as there is nothing, at all events, to negative the *prima facie* title of the plaintiff under the entry in this respect, by showing that there has not been a sufficient assignment by this or some other instrument, the statement upon the record not being inconsistent with the existence of a good assignment, I think that the learned Judge was not right in directing the jury to find a verdict for the defendant; and I accordingly answer your Lordships' last question in the negative.

* MR. JUSTICE WILLIAMS. — In answer to the question * 859 first proposed by your Lordships, I have to state my opinion, that the publication by the plaintiff in error did give to the defendant in error a right of action against him. The facts show, in my judgment, that the defendant in error, by assignment from the author, was the owner of the work in question at the time he printed and published it in this country; and that was enough, in my opinion, to give him the right of action under the Statute 8 Anne, c. 19 (extended by Statute 54 Geo. 3, c. 156). Assuming

for the present that the defendant in error was the assignee of the author of the work at the time it was first published in England, before any publication of it abroad, I have to maintain the proposition that the statute of Anne conferred on him a copyright in the work, from the date of that publication, notwithstanding the author of it was a foreigner, and then resident abroad. I lay no stress on the fact that the defendant himself was a resident Englishman ; because I am willing to concede that the proposition which governs the question, and which I am bound to sustain, in order to justify my opinion, is that a foreign author may gain an English copyright by publishing in England (before any publication abroad) though he may be resident abroad at the time. The authorities in favour of this proposition are no mean ones ; though the question does not appear to have been raised till modern times. In the case of *Clementi v. Walker*,¹ in the year 1824, the point actually decided was, that an author who had published first abroad gained no English copyright by a subsequent publication here ; at all events, after a delay and after a publication here by another. But

it is plain that neither to the counsel nor to the Judges in
 * 860 that cause did the doctrine ever occur, that * copyright could

not be gained by a foreign author who was resident abroad at the time of the publication ; and yet that doctrine would have furnished a ready and conclusive answer to one at least of the points which arose, but which was argued, and disposed of, upon other grounds in the considered and elaborate judgment of the Court. But the very question arose in the year 1835, before Lord Abinger, Chief Baron, on the Equity side of the Exchequer, in the case of *D'Almaine v. Boosey*,² where he granted an injunction in protection of the copyright of a foreigner who had first published in England. And in the subsequent case of *Chappell v. Purday*,³ the same Judge stated that he fully adhered to his decision in *D'Almaine v. Boosey* ; and he took occasion to mention that his mind had been many years before especially directed to the doctrine of copyright. Again, in *Bentley v. Foster*⁴ (in the year 1839), the precise point arose before Vice-Chancellor Shadwell. In that case the author of a work from whom the plaintiff had purchased the copyright was a citizen of the United States, domiciled and resident there : And the Vice-Chancellor said that in his

¹ 2 B. & C. 861.

² 4 Younge & C. Exch. 494.

³ 1 Younge & C. Exch. 288.

⁴ 10 Simons, 329.

opinion protection was given, by the law of copyright, to a work first published in this Kingdom, whether it was written abroad by a foreigner or not. And accordingly, in the year 1845, Chief Baron Pollock, in delivering the judgment of the Barons of the Exchequer, in *Chappell v. Purday*,¹ states the result of the cases at that time decided on the subject, to be, that if a foreign author, not having published abroad, first publishes in England, he may have the benefit of the statutes. These cases were followed in 1848 * by that of *Cocks v. Purday*,² in which it * 861 was decided by the Court of Common Pleas, after a deliberate consideration of the authorities as well as upon principle, that an alien amy resident abroad, the author of a work of which he is also the first publisher in England, and which he has not made *publici juris* by a previous publication abroad, has a copyright in that work, whether it be composed in this country or abroad. And this decision was followed without comment by the Court of Queen's Bench, in *Boosey v. Davidson*:³ The only authority which in any way conflicted with these decisions, up to the time of that of *Boosey v. Purday* (hereafter to be mentioned), was a passage in the judgment of the Barons in the case I have already cited of *Chappell v. Purday*. There the point actually decided was, that a foreign author who first published his work abroad, could not gain an English copyright under the statutes. But the Court, in giving judgment, further intimated an opinion that, on a proper construction of the Copyright Acts, a foreign author, or the assignee of a foreign author, whether a British subject or not, could not gain any English copyright. The opinion thus expressed subsequently grew so strong, that in *Boosey v. Purday*⁴ the Barons declined to follow the example of the Court of Queen's Bench, in *Boosey v. Davidson*, in acceding to the decision of the Common Pleas in *Cocks v. Purday*, and, in fact, overruled that case. The doctrine which the Barons laid down, and which has also been the foundation of the argument on behalf of the plaintiff in error, at the bar of this House, is, that the Legislature must be considered *prima facie* to mean to legislate for its own subjects, or those who owe obedience to its laws ; and consequently, that the Copyright Acts apply *prima facie* to British subjects only, in * 862 some sense of that term, which would include subjects by

¹ 14 M. & W. 303, 320, 321.

² 13 Q. B. 257.

³ 5 C. B. 860.

⁴ 4 Exch. 145.

birth or residence, being authors ; and that the context or subject matter of the statutes does not call for a different construction.

The doctrine, then, on which the case for the plaintiff in error is rested, does not deny that a foreign author may gain an English copyright by a publication in England, provided he is resident here ; and though it has not been said expressly to what period the requisite residence is to be referred, yet it seems plain that residence at the date of publication in England must be intended, because it must surely be immaterial where the author resided at the time he composed the work. This doctrine cannot be adopted by your Lordships without overruling the cases of *D'Almaine v. Boosey*, and *Bentley v. Foster*, and *Cocks v. Purday*. But on the part of the plaintiff in error your Lordships are called upon, as the supreme tribunal, to disregard these authorities as inconsistent with the true construction of the statute of Anne. Now, looking merely at the words of that statute, there is nothing at all to confine the benefits of it to British subjects, by birth or residence. And although the context and the other provisions of the statute plainly show (as is fully demonstrated in the judgment of the Court of Queen's Bench in *Clementi v. Walker*,¹ and in the judgment of the Court of Exchequer in *Chappell v. Purday*²) that the publication on which the privilege is to be conferred by the statute must be British, nothing of this kind appears as to the author being a British author.

The argument, therefore, for the plaintiff in error rests on this, viz. that the Act is styled "An Act for the Encouragement of Learning," and that its object is to encourage learned men * 863 to publish books, by conferring a * copyright on them : and that, though its language is general, yet, as the Legislature has no power but over its own subjects, natural-born or resident, it must be deemed *prima facie* to have meant to protect those alone on whom it can impose duties. But it can hardly be said that the Act would have been improperly called "An Act for the Encouragement of Learning in Great Britain," if it had expressly provided that the publication of literary works in Great Britain, by authors or purchasers from authors, whether British subjects or not, should confer a copyright. And although no one can dispute that the British Legislature has no power to legislate for aliens, in respect of matters not occurring in Great Britain, yet it certainly

¹ 2 B. & C. 861–868.

² 14 M. & W. 303–318.

has the power, and may well have the intention, to legislate for all the world, in respect of the legal consequences in Great Britain of an act done in Great Britain ; and may, therefore, well enact that if an author, whether he is a subject, or in no sense a subject of the realm, writes a book, whether abroad or in this country, and gives the British public the advantage of his industry and knowledge by first publishing the work here, the author shall have copyright in this country. The argument being that foreign authors resident abroad at the time of the publication of their works in this country are to be excluded from the benefits of the Act by implication, it becomes material to inquire whether such a construction of the general words of the Act might lead to any absurd, harsh, or unjust consequences. Lord Campbell, in his judgment in the Court below, has pointed out the difficulty of supposing the Legislature to have meant that a foreign author should have no copyright if he remained at Calais, but should gain it if he crossed to Dover, and there gave directions for and awaited the publication of his work. And the same may be said of a distinction that must be * taken, if the Act is to be construed as con- * 864 tended for ; viz., that a foreign author who during a residence in England has composed a work which is afterwards first published in England, by his order, and at his expense, shall have no capacity to acquire a copyright therein, if the exigencies of his affairs constrain him to quit England just before the work is published ; but that a foreign author who during his residence abroad has composed a work which is afterwards first published in this country, shall have the copyright, if he happens to come to England just before the publication, and abides here till it is complete. Now, with respect to the trade of booksellers (for whose protection, as well as that of authors, the Act purports to be made), such a construction might operate with much harshness. For if a bookseller were to purchase a literary work in manuscript from a foreign author resident in England, the copyright would be lost to the bookseller, if the author should choose to leave this country and be absent from it, even without the knowledge of the bookseller, at the time of publication. And if the bookseller should think it best to publish the work in several volumes at several times (as it has happened in many well-known instances) he might have copyright in some of the volumes and not in others, because the existence or non-existence of the right would vary

with the accident of the author's being or not being in this country at the dates of the respective publications of the volumes. I may add, that I think no little difficulty would arise in deciding on the rights of the bookseller, supposing the author were to die between the time of selling his work to the bookseller, and the time of the publication of the work in England.

It remains for me to state why I think the defendant in error ought to be regarded as the assignee of the author within *865 the meaning of the statute. I understand the *statements in your Lordships' questions to mean, that the laws of Milan recognise in the author of an unpublished book a right of property in it capable of being assigned, and that such right was duly assigned by Bellini to Ricordi, according to the laws of Milan, where the assignment was made ; and that the assignment in England from Ricordi to the defendant was duly made according to the laws of England. If the latter assignment had comprised the whole of the right which Bellini had assigned to Ricordi, the defendant, in my opinion, would have been plainly the assignee of Bellini, the author. And I think he was not the less so within the meaning of the statute, because the assignment from Ricordi was only for publication in Great Britain. For if the author assigned a right to publish in this country, he assigned, in my judgment, a right to gain all the benefit and privileges which the statute conferred on every publication in Great Britain ; and he was therefore the assignee of the author contemplated by the Act. The purchaser of a copyright from an English author would not, I conceive, be deprived of the privileges conferred by the Copyright Acts, because the assignment to him from the author was limited to publication in Great Britain ; and I can see no distinction between a foreigner and an English author.

In answer to your Lordships' second and third questions, I have to state my opinion that if the assignment to Ricordi had been made by deed under the hand and seal of Bellini, attested by two witnesses, or if Bellini, instead of assigning to Ricordi, had, while living in Milan, assigned to the defendant all his copyright by deed, similar in all respects to that executed by Ricordi, that would have made no difference, provided the supposed assignments had been operative according to the laws of Milan.

In answer to your Lordships' fourth and fifth questions, I

have to state my opinion that if the work had been printed and published at Milan before the assignment to the defendant, or after the assignment to the defendant, but before any publication in this country, the defendant, by his subsequent publication in England, would have gained no copyright. The reasons for this opinion may be found fully and clearly stated in the judgment of the Court of Exchequer, delivered by Chief Baron Pollock, in the case of *Chappell v. Purday*.¹

In answer to your Lordships' sixth question, I have to state my opinion, that if the assignment to the defendant had not contained any limitation as to publication in this country, that would have made no difference. I have already had occasion to give my reasons for this opinion.

Lastly, I am of opinion, that looking at the record as set out in the bill of exceptions, the learned Judge who tried the cause was wrong in directing the jury to find a verdict for the defendant. My reasons for this opinion have already been stated at large in my answer to the first of the questions proposed by your Lordships.

MR. JUSTICE ERLE.—To the first question of your Lordships, whether upon the facts stated the action lay? my answer is in the affirmative. This answer is founded upon the propositions: 1st. That all authors have, by common law, copyright and all other rights of property in their written works. 2d. That the statute of Anne extends to alien authors and their assigns, publishing first in England, as well as to native authors. Either of these propositions, if true, would defeat the case of the plaintiff in error; and I take them in their order.

With respect to the property of authors in their works at common law, as the authorities conflict, I would propose to recur briefly to some first principles relating to the origin and nature of the property, then to answer some objections,* and, *867 lastly, to review the authorities. The origin of the property is in production. As to works of imagination and reasoning, if not of memory, the author may be said to create, and in all departments of mind, new books are the product of the labour, skill, and capital of the author. The subject of property is the order of words in the author's composition; not the words

¹ 14 M. & W. 303, 319, 322.

themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation. The nature of the right of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation, and which is the right of an author, to which the statute of Anne relates. Thus, if after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personality in the like case. He may prevent publication ; he may require back the copies wrongfully made ; he may sue for damages if any are sustained ; also, if the wrongful copies were published abroad, and the books were imported for sale without knowledge of the wrong, still the author's right to his composition would be recognised against the importer, and such sale would be stopped. These rights would be enforced for an alien as well as for a native author, in case his private writings were copied wrongfully abroad and published here, it being a personal right resting on principles common to all nations who read, and analogous to the right of an alien, while residing abroad, to prohibit the publication here of words defamatory of his character,

which was recognised in *Pisani v. Lawson*.¹ Again, if an * 868 author chooses to * impart his manuscript to others without general publication, he has all the rights for disposing of it incidental to personality. He may make an assignment either absolute or qualified in any degree. He may lend, or let, or give, or sell any copy of his composition, with or without liberty to transcribe, and if with liberty of transcribing, he may fix the number of transcripts which he permits. If he prints for private circulation only, he still has the same rights, and all these rights he may pass to his assignee. About the rights of the author, before publication, at common law, all are agreed, and the cases on the point are collected in *Prince Albert v. Strange*.² But the dispute is, whether these rights had any continuance after publication until the statute of Anne. I submit the answer should be in the affirmative, both because printing, which is only a mode of copying,

¹ 6 Bing. N. C. 90, 8 Scott, 182.

² 18 Law J. N. S. Ch. 120; 1 Macn. & G. 25, 1 Hall & Twells, 1.

and unconnected with the right of copying, has no legal effect upon that right of control over copying which existed while the work was in manuscript, and because it is just to the author and useful to the community, in order that production should continue, to secure the profits of a production to the labour, skill, and capital that produced it; and this can only be effected by giving property after publication, as the profits on books only begin then to arise.

Those who object to the author's right at common law after publication rely mainly on three grounds: 1st. That copyright after publication cannot be the subject of property. 2d. That copyright is a privilege of prohibiting others from the exercise of their right of printing, and a monopoly lawful only by statute. 3d. That by publication the property of the author is given to the public.

With respect to the first of these grounds, that copyright cannot be the subject of property, inasmuch as it is * a mental abstraction too evanescent and fleeting to be property, and as it is a claim to ideas which cannot be identified, nor be sued for in trover or trespass, the answer is, that the claim is not to ideas, but to the order of words, and that this order has a marked identity and a permanent endurance. Not only are the words chosen by a superior mind peculiar to itself, but in ordinary life no two descriptions of the same fact will be in the same words, and no two answers to your Lordships' questions will be the same. The order of each man's words is as singular as his countenance, and although if two authors composed originally with the same order of words, each would have a property therein, still the probability of such an occurrence is less than that there should be two countenances that could not be discriminated. The permanent endurance of words is obvious, by comparing the words of ancient authors with other works of their day; the vigour of the words is unabated; the other works have mostly perished. It is true that property in the order of words is a mental abstraction, but so also are many other kinds of property; for instance, the property in a stream of water, which is not in any of the atoms of the water, but only in the flow of the stream. The right to the stream is not the less a right of property, either because it generally belongs to the riparian proprietor, or because the remedy for a violation of the right is by action on the case, instead of detinue or trover. The

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notion of Mr. Justice Yates that nothing is property which cannot be ear-marked and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it also simple, but is not true in a more civilized state, when the relations of life and the interests

arising therefrom are complicated. As property must pre-

* 870 cede the violation of it, so the rights must be * instituted before the remedies for the violation of them ; and the seeking for the law of the right of property in the law of procedure relating to the remedies is the same mistake as supposing that the mark on the ear of an animal is the cause, instead of the consequence, of property therein. The difference in the judgments of Mr. Justice Yates and Lord Mansfield on this point appears to me to be the difference between following precedent in its unimportant forms and in the essential principles. If the precedents in their unimportant forms are to be followed, it is clear there would be no precedent relating to printing before the time of Richard the First, when the common law in theory existed, as printing was not known then ; and this objection has been made to copyright at common law after printing. But if the essential principle for one source of property be production, the mode of production is unimportant ; the essential principle is applicable alike to the steam and gas appropriated in the nineteenth century, and the printing introduced in the fifteenth, and the farmers' produce of the earlier ages. The importance of the interests dependent on words advances with the advance of civilization. If the growth of the law be traced with respect to the words that make and unmake a simple contract, and with respect to the words that are actionable or justifiable as defamation, and with respect to the words that are indictable as seditious or blasphemous, it will be thought reasonable that there should be the same growth of the law in respect of the interest connected with the investment of capital in words. In the other matters the law has been adapted to the progress of society according to justice and convenience, and by analogy it should be the same for literary works, and they would become property with all its incidents, on the most elementary principles of securing to industry its fruits, and to capital its profits.

* 871 * With respect to the second objection, that copyright is a privilege of prohibiting others from the exercise of their right of printing, and so a monopoly lawful only by the statute, I

submit I have already shown that copyright is a property, and not a personal privilege in the nature of a monopoly. I submit also that the notion of all printers having a right to print whatever has been published is, on the same reasoning, a mistake. The supposition of the objector is, that there is a demand for books; that the supply is produced by labour, skill, and capital, for the sake of profit; that the profit begins to arise upon the sale of the production, and that as soon as the sale has commenced the law gives to the pirate an equal right to the profits with the producer; in other words, that the law gives up the most important production of industry to spoliation; which seems inconsistent. There is no ground for the assertion that a printer is at liberty to print any thing in print; to use the language of the Court in 1689, in the *Stationers' Case*,¹ he may print all that has been made common, but not that which has remained enclosed. Words are free to all; he may print any words that he can compose or get composed; but it does not follow that he may transcribe the composition which another has appropriated. The printer is prohibited from words of blasphemy and sedition, for the sake of the public interest; from words of defamation, for the sake of character; from the words in the books of the King's copyright, by reason of his property therein. The liberty of printing is restricted in these instances, and the principle of liberty would not be more infringed if the printing was restricted also as to the property of the author. Whether he is so restricted by law, is the question in controversy; and to assume that the supposed law would be contrary to lawful liberty and * therefore no law, is merely a form of assuming * 872 that the question in dispute is answered.

With respect to the third objection, that by publication the property is given to the public; if it is meant as a fact that the author intends to give it, it is contrary to the truth, for the proprietors of copyright have continuously claimed to keep it. If it is meant that the publication operates in law as a gift to the public, the question is begged, and the reasoning is in a circle. For the question being, whether the law protects copyright after publication, the reasoning in law is, that the law does not so protect it, because publication operates as a gift to the public; and the reasoning in fact is, that the publication must be taken to operate as a gift to the public, because after publication the law

¹ 1 Mod. 256.

does not protect copyright. In further support of this view, and for a more full statement of many points here, for the sake of time, merely touched, I would beg to refer to the argument of Wedderburn against Thurlow, in *Tonson v. Collins*,¹ and to the judgments of Lord Mansfield,² and Aston and Willes, Justices, against Yates, Justice, in *Millar v. Taylor*, and to the summing up of the argument on this point in *Donaldson v. Beckett*,³ as reported in Brown's Parliamentary Cases. In all of these cases the governing question was, whether authors had a perpetuity of copyright since the statute of Anne? This House decided in the last case that the statute had restricted the right to the terms of years therein mentioned, but it left the question of copyright at common law undecided.

With respect to the authorities, they decidedly preponderate in favour of copyright at common law. For those that are * 873 prior to Charles the Second, I refer, for the * sake of time,

to them as cited in the cases last mentioned. They are not judicial decisions upon the right, but they are, to my mind, good evidence that the right was, from the beginning of printing, known and supported. By the 13th & 14th Charles 2, c. 33, § 6, the Legislature recognises copyright as is shown more fully below; and in 16 Charles 2, the Court of Common Pleas adjudged for it by deciding in *Roper v. Streater*,⁴ that the assignee of the executor of the author had the copyright in the Law Reports of the author against the law patentee, and although the law patentee succeeded on error, that was by force of his patent over law works; not from the failure of copyright as to other works. Also the Statute of 8th of Anne, c. 19, is, to my mind, decisive that copyright existed previously thereto; and as it has been understood in an opposite sense, it may not be a waste of time to examine it with attention.

So far from creating the copyright as a new right, the statute of Anne speaks of authors who have transferred the copies of their books, and of booksellers who have purchased the copies of books in order to print and reprint the same; and if copyright in printed books was before the statute the subject of sale and purchase, it was the subject of property. It also speaks of the then usual manner for ascertaining the title to that property, for it

¹ 1 W. Bl. 321.

² 2 Brown, P. C. 129.

³ 4 Burr. 2303.

⁴ Skin. 234, referred to in 4 Burr. 2316.

directs that the title to the copy of books hereafter to be published shall be entered at the Stationers' Company in such manner as hath been usual. Indeed, the Statute 8 Anne, c. 19, § 1, is, as to this, identical with 13 & 14 Charles 2, c. 33, § 6. Each of these statutes recognises copyright as a property existing before the statute ; each secures it against piracy by penalty and confiscation ; each refers to registration with the Stationers' Company as a *mode of proving the right. They differ in *874 this, that under the statute of Charles the Second, the property was unlimited, and under that of Anne it is restricted to 14 and 21 years. The Legislature under Queen Anne had the double purpose of encouraging both learners and authors ; and as the monied interests of these two parties conflict, the learner wishing the book at the lowest, and the author at the highest price ; therefore, for the benefit of learners, the author's perpetuity in his property is reduced, as to future publications, to 14 years, with a contingent increase, and as to existing publications, to 21 years ; the larger term being due for the loss of a vested right, and the price of books is to be lowered, if certain officers shall judge it to be too high. On the other hand, for the benefit of authors, the power of fining pirates and confiscating their piratical property during the statutable term of copyright, as also the mode of proving proprietorship, and licenses under the proprietor, by means of registration with the Stationers' Company, are restored almost as they had existed from the 13th and 14th of Charles the Second, till late in the reign of William the Third.

The Judges, in construing the 8th of Anne, in *Millar v. Taylor*, advert to its Parliamentary history, as brought in to secure copyright, and altered in its progress to destroy it. But without going upon such a ground of construction, it is legitimate to observe, from the statute itself, that it appears to have proceeded from the conflicting interests of readers and authors. For the clause which has the appearance of promoting the interest of authors by vesting their property in them for a term, and giving them stringent remedies for its protection during that term, contains the expression which was ultimately discovered, after a most remarkable discussion, by the decision of this House in *Donaldson v. Beckett*, to have destroyed the perpetuity of *their property ; the clause vesting the property in them for the term, "and no longer." This decision created such a sacrifice

of the author's interest as I may assume has been thought inconvenient, seeing that the Legislature made one restoration to authors of their property by 54 Geo. 3, and another by 5 & 6 Vict.

Furthermore, all the actions on the case, and all the injunctions for infringements of copyright, during the first fourteen years after publication, are authorities for saying that the copyright of authors at common law has continued since the statute of Anne, no otherwise affected thereby than limited in duration. For, if the statute is to be held to create a new right for fourteen years, it created also a new remedy at the same time, and that remedy, according to law, would be the only remedy. And the very narrow point on which the plaintiff succeeded in *Beckford v. Hood*,¹ namely, that the new remedies given by the statute do not extend to the second term of fourteen years given to an author, in respect of which that plaintiff sued, would have been of no avail in correct reasoning for the first term of fourteen years.

In the learned conflict ending with *Donaldson v. Beckett*, the numbers for copyright at common law are in a great majority ; Lord Mansfield, Aston, and Willes, Justices, against Yates in *Millar v. Taylor* ; and ten Judges against one for copyright at common law ; and either eight Judges against three, or seven against four, for an action for infringement in *Donaldson v. Beckett*. Against copyright at common law, the sole judgment is that of Yates, Justice, of which I have before spoken ; Lord Kenyon seems to have held this opinion from some expressions used by him

in *Beckford v. Hood*. It is true that he gives the author, * 876 by that judgment, the remedy given by * the law in respect of a right at common law, but he derives the right from the statute of Anne ; and thereby the judgment is, I submit, anomalous. Lord Ellenborough also seems to have held this opinion, from some incidental expression in the *Cambridge University v. Bryer*.² But the latest judgment on the point is that of Lord Mansfield, in *Millar v. Taylor*, in which he does the service of tracing the law upon the question to its source in the just and useful. And Lord Mansfield's authority in this matter outweighs that of Lords Kenyon and Ellenborough, not only as an elaborate judgment outweighs an extra-judicial expression, but also because these successors of Lord Mansfield appear to me to have turned away

¹ 7 T. R. 620.

² 16 East, 317.

from that source of the law to which he habitually resorted with endless benefit to his country.

It is true that no record of an action on the case for infringement of copyright, prior to the statute of Anne, has been found ; the claim in *Roper v. Streater*, though founded on copyright, being in form for a penalty under the Licensing Act. But, the absence of resort to that remedy is no presumption against the right to it, if no such remedy was needed, or if more convenient remedies existed. And there is reason for believing that this was the case ; for printing, when first introduced, was regulated by the Legislature, and confined in its progress by the powers of the Star Chamber and High Commission Courts, and by Licensing Acts, and patents for the sole printing of certain works. And so late as the 13 & 14 Charles 2, c. 33, § 11, the number of printers is restricted by that statute to twenty, and of type founders to four ; and proprietors of copyright then registered with the Stationers' Company, and came under their regulations. And thus the opportunities for piracy were rare, while * presses were few and * 877 known, and consequently the need of an action on the case against a pirate would be small.

Furthermore, if there were pirates, the remedies in the Star Chamber, and for penalties under the statutes, were probably more convenient than actions for damages ; indeed, it is noticed by Willes, Justice, in *Millar v. Taylor*, that, in the time of Queen Anne, the poverty of those who practised piracy was such as to make an action for damages against them futile, and that therefore the booksellers petitioned for the statute of 8th Anne to enable them to punish piracy by penalty and confiscation. In such a state of society and of the law, the absence of an action on the case is of no weight in the way of presumption against the right.

Upon this review of principle and authority, I submit that authors have a property in their works by common law, as well since the statute of Anne as before it ; that such property includes copyright after publication ; that before publication abroad, the property of an alien author in his work is recognised in our law ; that this property of an alien author passed to the plaintiff below, and was infringed by the defendant below ; and that therefore the action lay.

But supposing your Lordships should be of opinion that since

the statute of Anne the right of an author to copyright after publication is derived from that statute alone, still I submit that the plaintiff below had cause of action. The plaintiff in error contends that the statute put an end to the property of the author existing at publication, and created a personal privilege in the nature of a monopoly; and that because the Legislature intended to encourage learning, and to induce learned men to write useful

books, that therefore it excluded alien authors from the
* 878 privilege so created. As to the statute putting an *end to

the property of the author, and creating a personal privilege, what I have before stated contains the grounds of my opinion to the contrary. It is clear that the author had and has property before publication, *Prince Albert v. Strange*;¹ the statute does not express an intention to annul or destroy property, and effect can be given to all its provisions without coming to that conclusion.

As to the right of prohibiting piracy being a personal privilege of monopoly, the answer is, that it is the same right as is incidental to all ownership, which in its nature prohibits the use of the property against the will of the owner, and is no more a monopoly in case of copyright than in the case of other possessions. Even if the statute should be held to annul the property after publication, still it leaves the property before publication as it was; and then the right of the plaintiff below stands, for he took by assignment, before publication, when the statute had no operation. As to the intention of the Legislature to exclude alien authors from the rights of authors in England, because it is intended to encourage learning, and to induce learned men to write useful books, the recited intention leads me to an opposite construction; for learning is encouraged by supplying the best information at the cheapest rate, and according to this view the learner should have free access to the advances in literature and science to be found in the useful books of learned men of foreign nations, and I gather from the statute that this was its scope. It is not to be supposed that the Legislature looked upon all foreign literature as bad, because of some pernicious writings, or on all British productions as good, on account of some works of excellence; nor is it to be supposed that the Legislature planned either to release British authors from a competition with aliens,
* 879 or to *restrict readers to a commodity of British produc-

¹ 18 Law J. N. S. Ch. 120, 1 Hall & Twells, 1, 1 Macn. & G. 25.

tions of inferior quality, at a higher price; or that it intended to give to British authors of mediocrity a small premium, at the expense of depriving British printers and booksellers of the profit of printing and selling works of excellence by aliens. If any such plan existed, the enactment contains no words for executing it. It provides for authors, which, in common acceptance, denotes authors of all countries; "author" expressing a relation to a work exclusive of country. The notion that "authors" here meant authors in some sense British, first emanated from the Court of Exchequer, in *Chappell v. Purday*, as a ground of judgment; and although years have since elapsed, I do not find that any one can express with the precision required for practice, in what sense the authors must be British. Perhaps Irish authors were not excluded; but if "authors" means British authors, by what construction were the Irish included? Perhaps alien authors, who owed British allegiance by reason of residence in Britain, are included; but if so, what is the residence that will qualify? Must it be during education, so that the mind should be British; or during composition, so that the work should be British? I believe that the answer to both is in the negative, the rule in this sense being too vague to be practical, and that the qualification is to depend upon the moment of publication or assignment. If the alien has come across the frontier at that moment, he is to be British within the statute. By such a construction the Legislature would be taken to have planned a British monopoly, and made it liable to be defeated by any alien, who would go through a senseless formality; which seems inconsistent. Moreover the construction is too vague for practice, not only as to the authors within it, but also as to the books to be affected thereby. If ancient manuscripts are brought to

* light from unburied cities, or private papers, written by *880 foreigners remarkable in history, are purchased and published by the skill and capital of a British bookseller, in neither case is the author British; but it is not to be supposed that Parliament would for that reason intend to deny security to such an investment, and to lay the profits of such a bookseller at the mercy of any pirate who would reprint; if it is said that the transcriber of a difficult manuscript is equal in merit with an author, is not such a notion devoid of practical precision? and if it is adopted, would the bookseller lose his investment, if he

employed an alien to transcribe? Again, if it is said that the collector of letters and papers of a distinguished foreigner might publish with notes and narrative, and so be protected, is not the protection illusory if the pirate might transcribe the original documents, and supply his own notes and narrative?

These considerations lead me to the conclusion that the construction proposed by the plaintiff in error is wrong. It is contrary to the general rule, requiring effect to be given to words according to their ordinary acceptation; it is contrary to justice and expediency, in depriving learners of information, and book-sellers of their profits, while the supposed protection of British authors from competition is of more degradation than gain to them.

In holding that the plaintiff below may maintain his action on copyright derived under the statute of Anne, no extra-territorial effect is given to that statute. The personal right of the alien author, at Milan, to the copyright in his manuscript, which is assumed in the question, is recognised in England, on the authorities collected in *Cocks v. Purday*;¹ the manuscript is assigned in Milan

by the author, and brought to England, without having
* 881 * been published abroad by the assignee, and he assigns to

the plaintiff before publication, and so before the term of copyright, supposed to be given by the statutes, begins. Afterwards the plaintiff, being such assignee, publishes in England, and after publication in England, claims the operation of the statute in England, to protect his right there; and in so doing, he claims only an intra-territorial effect from the statute. Nay, if the statute made void the assignment in Milan, which was valid by the law of that place, it would have an extra-territorial effect, by depriving an alien abroad of a personal right in England, which, but for the statute, the common law would have given him there. I rely on these reasons, in addition to the reasoning in the judgment appealed from, to show that the plaintiff in error is wrong in his construction of the statute of Anne, and that the plaintiff below had cause of action under that statute.

To the second question, whether, if the assignment from Bellini had been by deed, attested by two witnesses, it would have made any difference, I answer in the negative. In my opinion it is immaterial; the assignment by a foreigner abroad having validity in England, if in the form required by the law of the country

¹ 5 C. B. 860.

where it is made. Even if the English law operated in respect of the assignment of copyright at Milan, since the 54th Geo. 3, c. 156, § 4, that is since 1814, the requirement of two witnesses to a license, according to the statute of Anne, has ceased, and an unattested license in writing is sufficient, and therefore an unattested assignment in writing is valid. As the 54th of Geo. 3, c. 150, § 4, has altered the law on this point, it is not of much importance now to consider whether the requirement, in the statute of Anne, of two witnesses to a license, after publication, to be used by a defendant charged with piracy, was a requirement of two witnesses to an *assignment before publication, to be used by *882 a plaintiff in an action on the case for damages, as laid down in *Power v. Walker*.¹ The statute does require the defence of license to be so proved; and that in the case of a plaintiff claiming under a license, and suing for a statutable penalty, the license should be so proved; but it appears to leave the assignee, suing according to the common law, to prove his case under that law. Still it may not be immaterial to observe upon the decision in *Davidson v. Bohn*,² by which, since the 54th of Geo. 3, an assignment was held void, which had one witness, only that the difference between the Statute of 8th Anne, and the Statute of the 54th Geo. 3, was not adverted to therein.

To the third question, my answer is in the negative. It would have been immaterial. The assignment in the form valid at Milan would, in my judgment, be valid in England; so would also an assignment in the form valid in England, if made to an Englishman, to be used in England.

To the fourth question, whether a publication in Milan, before the assignment to plaintiff below, would have made any difference, my answer is in the affirmative. It would have defeated the right of the plaintiff below. I understand the cases to have decided that there is no copyright in England for a work which has been already published abroad. It seems that the Legislature recognised this to be the law by 8th Anne, c. 19, § 7, relating to the importation of books printed abroad, and by the statutes on international copyright.

To the fifth question, my answer is the same as to the fourth; the lawful publication abroad would defeat a claim of copyright in England.

¹ 3 Maule & S. 7.

² 6 C. B. 456.

To the sixth question, whether, if the assignment to the plaintiff below had not contained a limitation to this *country, it would have made any difference, my answer is in the negative; it would be immaterial, for the reasons given in my answer to the first question. The owner of copyright may dispose of the whole, or any part of his interest, as he may choose.

To the last question, whether the Judge was right in directing a verdict for the defendant, my answer is in the negative, the plaintiff having been, in my judgment, entitled thereto, on the grounds before stated.

MR. JUSTICE WIGHTMAN. — It appears from the statement of facts which precedes the questions proposed by your Lordships, that Boosey, the defendant in error (a British subject residing in England), was the first publisher of a certain literary work, and that such first publication was in England; but that he was not himself the author of the work, nor the immediate assignee of the author, who was an alien, residing at Milan, and who there assigned, by an unattested written instrument, what is called his copyright in the work, to one Ricordi, who assigned the same in England, by deed attested by two witnesses, to Boosey, the defendant in error, but for publication in the United Kingdom only.

The first question proposed by your Lordships is, Did Jefferys, by printing and publishing the same work in England, subsequently to the printing and publishing by Boosey, give to the latter any right of action against him? The answer to this question depends upon the construction to be put upon the Statute of 8 Anne, c. 19; but it may be expedient to consider the nature of the property, and of the right of an author in what may be called "the copy" of his works, as recognised by the common law, independently of the statute. It appears by the answers of the

Judges to the questions proposed to them by the House of *884 *Lords, in the case of *Donaldson v. Beckett*,¹ that ten out of eleven Judges were of opinion that, by the common law, an author of any literary composition had the sole right of first printing and publishing the same for sale, and eight out of the eleven were of opinion that he might bring an action against any one who published the same against his consent; seven of the eleven

¹ 4 Burr. 2408, 2 Brown, P. C. 129.

were of opinion that the author did not lose his right upon his publishing the work ; and six of the eleven Judges were of opinion that whatever right of action the author might have had by the common law, after publication, it was taken away by the statute of Queen Anne. The only point upon which the Judges were almost unanimous (ten to one) was, that by the common law, the author of a literary work had the sole right of first printing and publishing the same for sale. Upon the mode of enforcing the right, and the extent of it, after the first publication by the author, there was much greater difference of opinion, and the majority came to the conclusion that, after publication, the right and the remedy for any infringement were regulated by the statute. It would appear then, from the opinions given by ten of the eleven Judges, to whom may be added Lord Mansfield, that by the common law the author of a literary composition is entitled to "the copy" of it. The term "copy" is said by Lord Mansfield, in the case of *Millar v. Taylor*,¹ to have been used for ages in a technical sense to signify "an incorporeal right to the sole printing and publishing of something intellectual communicated by letters." This incorporeal right of property the author has at common law, according to the opinion of those learned persons, from the time of composition down at least to the time of first publication ; and by the Statute of 8 Anne, c. 19, from the time of first publication for the time specified in * that and * 885 the subsequent Statute of 54 Geo. 3, c. 156. This incorporeal right of property may be possessed by any one who may acquire or hold personal property in England, as far as the right of property depends upon the common law. The right of property is merely personal, and an alien friend, by the common law, has as much capacity to acquire, possess, and enjoy such personal right or property as a natural-born British subject.

An alien friend may possess any description of personal property in England, and maintain any action in respect of it applicable to the nature of the wrong. He may have a property in its nature incorporeal in his character and reputation, and may maintain an action for verbal or written slander. In *Tuerloote v. Morrison*,² the plaintiff brought an action against the defendant for verbal slander, and the defendant pleaded that the plaintiff was an alien

¹ 4 Burr. 2303.

² 1 Bulst. 134, Yelv. 198.

at the time of speaking the words, born at Courtrai, in Brabant, out of the King's allegiance, upon which the plaintiff demurred, and had judgment in his favour, the Court saying, that the protection of the common law extended both to the goods and to the person of an alien friend. This appears to have been the first instance of such an action ; but in the more modern case of *Pisani v. Lawson*,¹ an action for libel was held to be maintainable by an alien, though resident abroad, in accordance with an Anonymous case reported in Dyer,² in which it was held that an alien residing abroad might maintain an action of debt in the English Courts.

It is hardly disputed in the present case, that if Bellini, the author, an alien friend, had come to England, and there, for the first time, published his work, he would have been entitled

*886 to copyright, and to the protection afforded to * authors by the statute of Anne, or if, being in England, he had duly assigned his copy to Boosey, who had published the work for the first time, the latter would have been entitled to copyright and the protection of the statute. The question turns upon the circumstance of Bellini being an alien resident in Milan at the time of the assignment by him and of the publication of the work in England. It was said for the plaintiff in error, that Boosey, at the time of the publication in England, could have no greater right than the author himself would have had, supposing he had published it on his own account whilst residing at Milan, and that the author, unless he was in England at the time of publication by him there, could acquire no English copyright, as it was called, as all that he was possessed of whilst resident at Milan was what was called a Milanese copyright, and that when he assigned to Ricordi, he assigned no right in England, but only a right in Milan. It is proper that I should now advert to the Statute of the 8th of Anne, c. 19. [His Lordship stated the title, the preamble, and the first section of the statute.] The statute gives the author or his assignee copyright, properly so called, from the time of the first publication in England. From the expressions used in it there is a recognition of proprietors of literary works, independently of the statute, and it enables the author to give to an assignee the same power to obtain a copyright that he possessed himself ; but neither he nor his assignee would be entitled to copyright until publica-

¹ 8 Scott, 182, 6 Bing. N. C. 90.

Dyer, 2 b.

tion. Whatever right the author may have possessed before publication must have been at common law. The statute is general in its terms as to the persons who may be entitled to the benefit of it, and has no words or expressions to show that it was intended for the exclusive benefit of authors who are British subjects. It professes to be an Act for the encouragement of learning * generally, and for the encouragement of learned men to compose and write useful books, without reference to any country or persons. Literature and learned men are of no particular age or country, and the benefit to be derived by this country from the encouragement of learned men would be greatly reduced if the operation of the statute was restricted to native authors. It seems, indeed, to be admitted, that if a foreign author comes to England for however short a time, and first publishes his work here, he is entitled to the benefit of the statute; but if he stopped at Calais, and sent his work to London by an agent to be published for him, he would not be entitled; or if he assigned his copy at Calais, he would transfer no right or property to his assignee, though he would if he assigned at Dover. It is said, and said correctly, that the English municipal law has no operation *extra fines*, but the question in the present case arises with respect to a matter occurring within the realm, namely, the first publication in England of a work by a foreign author which had not been published elsewhere before. Neither the common law nor the statute of Anne excludes the right of a foreign author to possess such a property in England, though he may be resident abroad, and to maintain a personal action, if such personal right or property, though incorporeal, is infringed, and if Bellini himself had been the publisher, though resident abroad, I am not aware of any good reason why he would not have been entitled to all the rights that an English author would have been entitled to, and the principles deducible from the authorities I have already referred to fully warrant such a conclusion. But it is said, that even if Bellini could, by publication himself, and on his own account, in England, though he was at the time resident at Milan, become entitled to copyright and the protection of the statute, he could not by an assignment at * Milan give any title to * 888 copyright in England to an assignee, for that he had nothing to assign before publication in England but what is called a Milanese copyright.

If the opinions of the ten Judges in the case of *Donaldson v. Beckett* and others be correct, Bellini would be possessed, as author, of an incorporeal right or property in his unpublished work, recognised by the law of England. It is true his right would not come into question until it was to be claimed or exercised in England, but his right and property would nevertheless exist. That which Bellini had at Milan, was "the copy," or right of publication of his work, a species of personal property incorporeal, which, as it seems, the common law of England considers every author entitled to, and which, when carried into effect by actual publication in England by the author or his assignee, would entitle either to the benefit and protection of the statute of Queen Anne. The property which Bellini had in "the copy" of his work he assigned at Milan to Ricordi, and being a personal matter, the assignment would transfer the property, so as to give the assignee the same right that the assignor had in all countries where such property is recognised, and in which it may be transferred by assignment, as it may in this case, both by the law of Milan and the law of England. The law of Milan will not confer any right upon an author in this country, nor will the law of England confer any right at Milan, or have any ex-territorial power. But the question here is whether a certain subject matter is property assignable by the English law, though its first existence may have been abroad.

In all, or almost all the cases that have occurred upon the subject of copyright, it has been made a question whether, before publication, there could be any property in an author in

* 889 his composition. There has been no * decision, of which I

am aware, that there may not be such property, and if there is, as would appear to be the case from the opinions to which I have referred, it would be subject to the ordinary incidents to such property. In the case of *Tonson v. Collins*,¹ which was an action on the case for pirating *The Spectator*, it was said, *arguendo*, that that part of the special verdict which stated that the author, Mr. Addison, was a natural-born subject, was of no consequence, because the right of property, if it existed, was personal, and might be acquired by aliens. That case was by five or six years prior in date to the case of *Donaldson v. Beckett*, to which I have already referred, and there was no decision upon it.

¹ 1 W. Bl. 321.

In the case of *Clementi v. Walker*¹ the question now under consideration did not arise, nor does the decision in that case at all govern the present.

The first case of which I am aware in which the question came directly before a court of common law, and in which there was an express decision upon the point now under consideration, was the case of *Chappel v. Purday*.² In that case it was intimated by the Court of Exchequer, that a foreign author residing abroad, who composed and published his work abroad, had not, either at common law or by the Statutes of 8th of Anne, c. 19, or 54th Geo. 3, c. 136, any copyright in this country. The Lord Chief Baron, in giving judgment in that case, says : "We think it doubtful whether a foreigner not resident here can have an English copyright at all, and we think he certainly cannot, if he has first published his work abroad, before any publication in England." That latter circumstance of the first publication being abroad, distinguishes that case from the present, and leaves the question of the right * of a non-resident foreigner who first publishes in * 890 England doubtful.

In the previous case of *D'Almaïne v. Boosey*,³ decided by Lord Abinger in the Exchequer in Equity, he observes : "The Acts give no protection to foreigners resident abroad in respect of works published abroad." I may here remark, that in the case of *Chappell v. Purday*, the Lord Chief Baron, after reviewing the previous decisions, says : "The result seems to be, that if a foreign author, not having published abroad, first publishes in England, he may have the benefit of the statutes."

In the case of *Cocks v. Purday*,⁴ the express point now under consideration arose, and the Court of Common Pleas held that a foreigner resident abroad may acquire copyright in this country in a work that is first published by him as author, or as author's assignee, in this country, which has not been made *publici juris* by a previous publication elsewhere.

The same question came before the Court of Queen's Bench in the case of *Boosey v. Davidson*,⁵ and it was held by that Court that a foreigner, though resident abroad, may have copyright in this country, if the first publication is in this country. The circumstances in that case were the same as in the present.

¹ 2 B. & C. 861.

² 1 Younge & C. Exch. 288.

³ 13 Q. B. 257.

⁴ 14 M. & W. 303.

⁵ 5 C. B. 860.

The next case was that of *Boosey v. Purday*,¹ in which the question was the same as in the present, and in which the Court of Exchequer held that a foreign author residing abroad, who composes a work abroad, and sends it to this country, where it is first published under his authority, acquires no copyright therein; neither does a British subject, who claims under an assignment made abroad by the author, gain any such right.

* 891 * In the case of *Ollendorf v. Black*,² Vice-Chancellor Knight Bruce was of opinion that a foreign author, who first published in England, did acquire a copyright.

Upon modern authority, then, there appears to be a preponderance in favour of the proposition that a foreign author, resident abroad, can by first publication in England acquire a copyright here; but I am also of opinion that, upon the principles deducible from the older authorities, and upon the true construction of the Statute of the 8th of Anne, he may acquire such a right. With respect to the assignment to Ricordi, there is nothing in the terms used in the Statute of 8th of Anne, c. 19, which requires the assignment to be either by deed or attested by witnesses; and at all events, since the Statute of 54th Geo. 3, c. 156, it appears to me that an assignment by writing only is valid; and by the law of Milan, where it was made, it is said to be sufficient to pass such property. I therefore think that the defendant in error (Boosey) had a right of action against Jefferys.

With respect to the second and third questions proposed by your Lordships, it appears to me that it would not have made any substantial difference in the case if the assignment to Ricordi had been by deed attested, or if the assignment had been direct at Milan from Bellini to Boosey, by deed attested. My reasons are included in those which I have presented to your Lordships in answer to the first question; and though by the English law an assignment of a copyright should be by writing, neither the law of England nor of Milan requires that it should be by deed, or attested.

With respect to the fourth and fifth questions proposed by your Lordships, it appears to me that, if the work had been printed and published at Milan before the assignment * to Boosey, or after the assignment to him, but before publication here, neither the author nor his assignee would have been entitled to copyright in England. It appears to me that first

¹ 4 Exch. 145.

² 20 Law J. N. S. Ch. 165.

publication in England is essential to entitle the author or his assigns to the protection given by the statute. In this view of the case, my opinion is supported by the judgment of the Court of Exchequer in the case of *Chappell v. Purday*. I may observe, that a first publication at Milan by the author after assignment would not be by a wrong-doer as far as Boosey is concerned, as the assignment to him is limited to publication in England.

With respect to the sixth question, it appears to me that the limitation in the assignment makes no difference, under the circumstances of the case. A first publication in England under such an assignment would, I think, entitle the assignee to the benefit of the statute ; for no terms, however general, could restrain a publication abroad, where the English law has no operation ; and I am not aware of any rule of law which would make such a restricted assignment invalid, though it may be that, as far as copyright in the British dominions is concerned, a restricted assignment would exhaust the whole power of the assignor, and that he could not make another assignment to take effect in another place.

Upon the last question proposed, I am of opinion that, looking to the record as set out, the learned Judge who tried the cause was wrong in directing the jury to find a verdict for the defendant.

MR. JUSTICE MAULE. — Before answering the several questions put to the Judges, I propose to begin by stating some of the principles on which I think the solution of those questions depends.

* In so doing, the nature of copyright itself is first to be considered. In the sense in which copyright is commonly spoken of, it comprehends, first, the right belonging to an author before publication, that is, the right to publish or not, as he thinks fit, and to restrain others from publishing ; and, secondly, the right, after publication, of republishing, and of restraining others from doing so.

The first kind of copyright (that of the author before publication) has been much less questioned than the right after publication ; and indeed there are reasons for the right before publication, which do not apply to the right after publication ; as well as reasons against the right after publication, which do not apply to that before publication.

With respect to the right before publication, as above described, I am of opinion that such right does in fact exist by the common law of England. The weight of authority is in its favour; it has scarcely been disputed, and it appears to me to arise out of the nature of the thing, and to be like the law of the exclusive right of property in personal chattels, arising out of their nature in respect of their mode of acquisition, and their capacity of exclusive use; and that, therefore, like the law enabling private persons to hold property in personal chattels, it is to be presumed to be the law of all civilized countries, so far as not derogated from by the municipal law of any particular country. It therefore appears to me that the law giving to the author the extent of copyright applicable to the case of an unpublished work, must be taken not only to be part of the common law of England, but also to be the law of all countries where it is not shown to be restricted by the law of the place, and therefore that it must be taken to be the law of Milan.

The second kind of copyright, that which restrains all but *894 the owner of the copyright from republishing a book *already published, certainly does not arise, like the first kind of copyright, out of the nature of the thing. It is rather in derogation of the natural right of an owner of a copy of a published book to make what use he will of his own property, by copying it or otherwise. Whether such a copyright, does actually exist by the common law of England, has been much questioned, and high authority may be cited on both sides. But it is not necessary for my present purpose that I should decide this question, except so far as to say that I am of opinion that no such right exists in respect of the first publication in England, of a book which had been previously published in a foreign country. The existence of such a law is not supported by authority, and, if it existed, it would take away the right of an owner of a copy of a work, so published, to republish it in England; a right which he clearly had before the first publication here. It is indeed conceivable that such a law might exist, and that its object might be to encourage and reward the republication in this country of good books already published abroad. But it is very unlikely that such a law, if it existed, would give, without any distinction, the same monopoly to a republisher of a book which any one might and could republish, as to an author of an unpublished work; I think

it, therefore, very clear that the common law does not confer any copyright on the first publisher in England of a book already published abroad, the right to publish such a work having thereby become common to all. But whatever may be the common law, there is no doubt that a right after a first publication in this country, and indeed arising out of that first publication as well as dating from it, is conferred by the Statutes of 8 Anne, c. 19, and 54 Geo. 3, c. 156, and the existence of this right is sufficient to enable me to answer the questions proposed.

* A main question debated at the bar, and often agitated * 895 elsewhere, was, whether the statutes of Anne and Geo. 3, do, on their true construction, give the sole liberty conferred by them on authors and their assigns to authors and their assigns who are aliens, and it appears to me that they certainly do. By the common law of England, aliens are capable of holding all sorts of personal property, and exercising all sorts of personal rights. Their disabilities in respect of real property arise out of special laws and considerations applicable to property of that particular kind. So that when personal rights are conferred, and persons filling any character of which foreigners are capable are mentioned, foreigners must be comprehended, unless there is something in the context to exclude them. The general rule is, that words in an Act of Parliament, and indeed in every other instrument, must be construed in their ordinary sense, unless there is something to show plainly that they cannot have been used, and so, in fact, were not used, in that sense. Here the words to be construed are, "author, assignee, and assigns." These words plainly comprehend aliens as well as others; and there is nothing, as it seems to me, in any part of the Acts to show that they are to be restricted. Indeed, those who reject this construction, do not rely on any thing to be found in the terms of the Acts; nor is it pretended that, by construing the words in their proper sense, any contradiction, incongruity, or absurdity will arise. But it is said that the intention of the Acts is restricted to the encouragement of British industry and talent, and that this construction of the words would give an effect to the Act beyond that restricted intention, *Chappell v. Purday*.¹ I cannot bring myself to think that any such restriction was intended; it certainly is not expressed. But even * taking the intention of the Acts * 896

¹ 14 M. & W. 303.

to be as assumed, it would not, I think, be sufficient to take from the general words of the Legislature their natural and large construction ; for British industry and talent will be encouraged by conferring a copyright on a foreigner first publishing in England ; industry, by giving it occupation ; and talent, by furnishing it with valuable information and means for cultivation. It is also said that the Legislature was dealing with British interests, and legislating for British people. This is true ; but to give a copyright to a foreign author publishing in this country is dealing with British interests, and legislating for British people. Some parts of the Acts, it is said, though expressed generally, must be construed with a restriction to this country. And this is true with respect to the extent of the sole liberty of printing conferred by the Acts in general terms. But these words are, with respect to their operation, necessarily confined to the dominions within which the Legislature had the power of conferring such liberty ; and the words prohibiting importation show that the framers of the Acts had this construction distinctly in view. But this consideration has no operation with respect to the persons on whom the sole liberty is conferred. The words, "author, assignee, and assigns," naturally comprehend aliens ; and the Legislature is not denied to have had the right and power of conferring the sole liberty on them if it thought fit. In my opinion, therefore, the Acts confer a copyright on a foreign author, or his assignee, first publishing in England. To hold otherwise would, I think, be contrary to the plain meaning of the Acts, and would be a most inconvenient restriction of the rule, which, in personal matters, places an alien in the same situation as a natural-born subject.

* 897 Having stated the principles on which I think the * several questions put to the Judges may be determined, I proceed to answer them severally.

As to the first, it appears to me that Bellini was an author within the meaning of the Acts of Anne and Geo. 3 ; that the copyright which he is said to have had is to be taken to have comprehended the copyright before publication, as above explained ; that by the transfer of that right, which is stated to be valid by the laws of the country where it was made, Ricordi became an assignee of the author within the meaning of the Acts, and acquired under them, as incident to that character, the right of obtaining to himself or his assignees, by a first publication in this

country, the sole liberty of printing conferred by the Acts upon an author and his assignee; and that Ricordi duly assigned that right to the defendant. The words limiting that assignment to publication in the United Kingdom do not operate, I think, as restrictive of the rights acquired by the defendant Boosey to become entitled, under the Acts, to a sole liberty of printing and publishing in this country, by publishing here before any publication elsewhere; and I think this assignment, notwithstanding such limitation, constituted the defendant a complete assignee of all the right of publishing recognised and conferred by the statutes, that is the right of publishing in the United Kingdom, as effectually as it would have done if the limiting words had been omitted. Words not so limited would have given no greater British right, and I think it makes no difference with respect to that effect, that perhaps such words might have conferred some rights in other countries, which perhaps Ricordi may have had. I therefore answer the first question, that the publication by the plaintiff in error did give the defendant in error a right of action against the plaintiff.

As to the second question, I think it would have made * no *898 difference, supposing the other circumstances in the first question to be the same.

Thirdly. I think it would have made no difference. This question does not state that such a deed would have been operative by the laws of Milan; but as the subject of it was expressed to be, and actually was the right of publishing, or that of acquiring such right by proper means in the United Kingdom only, and as the deed was in a form, which by the law in this country was proper to operate on such a subject, and was executed by an "author," on whom the Acts conferred the British right and the power of transferring it, I think such deed was effectual for the purpose of constituting an assignee with the Acts.

Fourthly and Fifthly. In the cases supposed in these two questions, I think the defendant in error would have had no right of action against the plaintiff in error. The copyright in printed books, given by the Acts of Anne and Geo. 3, is given to the authors and their assigns, of books not printed or published. This, I think, means not printed or published generally, or anywhere. The words naturally bear this meaning; and there is nothing, I think, to restrict it. When a book has once been pub-

lished, the right to republish it seems to be common to all, except so far as the law of any place may specially restrain it. At the time of the defendant's publication in the cases supposed in these questions, he was not the author, or assignee of the author, of a book not printed and published, and on such only is the sole liberty conferred by the statutes, and I have already shown that no such right exists at common law with respect to a book previously published in a foreign country.

Sixthly. I think, for the reasons stated in answer to the first question, that whether the words limiting the right to the *899 United Kingdom were or were not contained in the *as-

signment, the defendant in the case supposed in the first question would have had a right of action against the plaintiff.

Lastly. It appears to me that, for the reasons above given, the learned Judge was not right in directing a verdict for the defendant.

MR. JUSTICE COLERIDGE.—In answer to your Lordships' first question, I am of opinion that the publication therein stated gave to the defendant in error a right of action against the plaintiff in error, and this question in substance is one of so long standing, and has been so often discussed with so much learning, and such great ability, that I despair of adding any thing new in support of my opinion. Therefore, although your Lordships will expect me to state my reasons for entertaining it, I shall endeavour to do so as shortly as I can, and without any complete or detailed collection of the conflicting authorities.

First, however, it is necessary to settle the state of facts on which I found myself. The question appears to me to identify, for the purposes of the argument, Bellini and Ricordi. The former is said to have "a certain copyright," which copyright he effectually vested in the latter. If by the words "certain copyright" your Lordships had intended to speak of a copyright with any limitations specified in the contract material to the present argument, I must presume they would have been stated; I consider, therefore, that none is to be supposed to have existed. On any other supposition the question cannot be answered at all, because we do not know its terms; and further than this, as your Lordships, addressing English Judges, use the term "copyright" without any definition, I must assume that, although speaking of a

Milanese author in Milan, * and a Milanese production, * 900 your Lordships use "copyright" in the sense in which an English Judge would define it, according to English law, to an English jury. And still further, although the question states Bellini to have been an alien friend, and is silent as to Ricordi, I suppose I must, in order to raise the question at all, assume that Ricordi is to be considered an alien friend also. Ricordi, then, came to this country, bringing with him an unpublished manuscript of a literary work, of which he was the lawful owner, and owner also of the copyright, so far as the original author could confer it on him. The manuscript, namely, the paper with the writing on it, was a personal chattel. The unrestrained copyright, or copy, to use the technical term, is well defined by Lord Mansfield in *Millar v. Taylor*,¹ as "the incorporeal right to the sole printing and publishing." These are manifestly two distinct properties, capable of distinct violations, protected by distinct sanctions and remedies, but both, such in their nature as an alien friend may by our law possess, and entitling him to the enjoyment and use of all such sanctions and remedies, in case of violation, as a natural-born subject would have. It seems to me, therefore, that he stood in the same situation as a natural-born subject would have been in if he had composed a literary work in Milan, and brought it with him unpublished to England.

Two considerations, however, are suggested as difficulties at this stage of the argument, the first arising from the nature of the thing itself, the right of copy ; that which the French jurists call the "object" of the right, and the second from the quality of the person, or what they call the "active subject" of the right. It is said that from the nature of the thing, the property being the creation of positive law, and both Bellini and Ricordi owing their * right of property entirely to the law of Milan, which * 901 could have no operation in England, Ricordi bringing the manuscript with him here, brought no right of property attached to it. Secondly, it is said that there is a difference between a natural-born subject and an alien amy in England ; because it has been decided that a prior publication abroad prevents the latter from having any copyright in England, whereas it has not that effect in regard to a natural-born subject.

I will consider in what follows both these objections. It would

¹ 4 Burr. 2397.

certainly be a miserable reflection on our municipal law, whether common or statute, both in respect of its consistency and breadth, if the first objection could be maintained. It cannot be denied, that the alien arriving with the manuscript in his portmanteau, if it were stolen from him, might have recourse to the criminal law of the country, and that if it were stolen from the possession of another person to whom he had lent it, he might, in the indictment, still describe himself as the owner of the property. It is not denied, that if it were taken from him in any way other than feloniously, he might sue for it, or its value, in detinue or trover. But this value, it is said, is merely that of the paper and ink, and that it is immaterial whether the writing on it be a collection of nonsense verses, or the most excellent product of human intellect; because, although he has the undoubted right and power to prevent any one from seeing, reading, or multiplying copies of it, yet, if this last be done unlawfully, because he has no right to multiply copies himself exclusively, he is not injured by the act of multiplication by another, and therefore is not entitled to any compensation. I do not wish to wander unnecessarily into equitable considerations, yet I may observe, in passing, that I presume that if the alien amy had corresponded from abroad with an English-

man here, and that Englishman should attempt to publish

* 902 * the letters against his will, he, being in England, might restrain him by injunction, on the ground of his property,

and might have an account against him for the profits of the publication, if he published them, on the same ground. And this seems to me very material to the present inquiry. I confess to the strongest disinclination to the belief that our law is so inconsistent and narrow. But, before I come to the inquiry directly into this, let me observe, that it seems to me a fallacy to found Ricordi's rights, in England, upon any supposed operation of the Milanese law here, and that the whole argument on the intra-territorial operation of municipal laws, on which so much learning was exhibited, is purely beside the question. The Milanese law is only of importance to establish the validity of the contract at Milan, and to show that what Bellini had, was, according to that law, well transferred to Ricordi; that Ricordi came into this country the lawful owner, as against Bellini, and through him against all the world, of the manuscript, with all the rights incident to such ownership which the English law would attach to it. It will not

be contended, of course, at this time of day, that our law does not regard contracts made abroad. But, as I thus limit the operation of the Milanese law, so, by parity of reason, I limit the operation of the English law to transactions in England; and if it requires any special formalities to the validity of the transfer of copyright, I say they were entirely out of the question as to giving effect to the transfer, which did, in fact, take place between Bellini and Ricordi, in Milan.

Having cleared the case as to that difficulty, I come to consider what rights of property Ricordi had, as the lawful owner of the unpublished manuscript, living in this country, and at first without reference to his being other than a domiciled native; that is, looking only to * the object itself. And I apprehend * 903 that he had the exclusive right of multiplying copies of it, with the necessary remedies for the vindication of that right in our Courts of law. That copyright for the author of a literary work (and there is no distinction for this purpose between a literary and a musical composition, expressed in musical characters) exists by the common law, unless taken away by the statute of Anne, or some succeeding statute, ought, I think, to be considered as settled by the judgment of the Court of Queen's Bench, in *Millar v. Taylor*,¹ and by the all but unanimous opinions of the Judges, expressed in this House, in the case of *Donaldson v. Beckett*.² At the time when those cases were decided, but one Judge on the Bench held a different opinion, and the Lord Chancellor had acted in accordance with the majority. The point is one which is unaffected by lapse of time, change of circumstances, or advancement in science. The Judges of that day had every light by which to decide it, which we have now; all the difficulties which are presented now were as ingeniously and forcibly presented then, and they did not prevail. If there was one subject more than another upon which the great and varied learning of Lord Mansfield, his special familiarity with it, and the philosophical turn of his intellect, could give his judgment peculiar weight, it was this. I require no higher authority for a position, which seems to me in itself reasonable and just; indeed, I do not know what point can be considered as concluded to any Court in this country, except that of your Lordships' House, if this is not.

The reasons on which the judgment of that day rested apply

¹ 4 Burr. 2303.

² 4 Burr. 2408, 2 Brown, P. C. 129.

with equal force to the lawful owner or assignee, as they do to the author himself, to the alien amy in this country, as to

*904 the native subject; for the principle is * property. It is carefully established in the judgments in the Queen's Bench, that property was the foundation of the right; the author had the copyright because he was the owner,—the Crown had copyright in certain books, because it had acquired the ownership by the outlay of money. Where there is the same reason, there must be the same law, if no statute intervenes to prevent it. Ricordi, being the lawful owner of an unpublished manuscript coming into this country, by the law of which a native author, because the owner of his manuscript had copyright, would have it also, because, in regard of such property, the law of the country places an alien amy resident here in the same situation as a natural-born subject.

This being the state of things at the common law, how is it affected by the statutes? Now, these either apply to such a case, or they do not. If they apply, they may be held to restrain the common-law right, or to extinguish it, giving a new one in its place. If they do not apply in any particular case, then, in that case, the common law remains; for the repeal of the common law is only inferential. It cannot be maintained, I conceive, that they do not apply for the benefit of foreigners, but do apply for their injury. Wherever they either extinguish or restrain, they also create a new right, or give a modified one. And this may be very reasonable; even a larger right may be attended with so many practical difficulties, in the way of enjoyment, that a more restrained one, properly guarded, and simplified, may be more beneficial. But it would be simply unreasonable and unjust to say: "You are not within our contemplation for the purpose of protecting the new right, but you are for that of extinguishing the old."

If, then, I am right in supposing that a foreign author or owner of an unpublished manuscript, under the circumstances *905 of Ricordi, that is, being an alien friend in England, had, at common law, copyright in England, the construction of the statute becomes a matter of indifference as to the answer to your Lordships' questions. But, suppose that I am not, I apprehend it will not be denied that if Bellini, being here, had composed, or had come here with a work previously composed

abroad, but remaining unpublished, he would have been within the provision of the statutes of Anne and George the Third, in respect of copyright, and might have conferred a good title on his assignee under those statutes respectively. No case, that I am aware of, has excluded from the benefit they confer, foreigners, except those who are resident abroad, at the time when the right to the benefit must, if at all, attach. If this is so, on what ground is Ricordi, the lawful owner of the unpublished manuscript by good conveyance from Bellini, from him, and being in England, to be excluded ?

The statute of Anne speaks, in respect of works already printed, "Of the author who hath not transferred to any other, the bookseller, the printer, or other person or persons, who hath purchased or acquired the copy of a book, in order to print the same"; and in respect of books, not then printed and published, it speaks of "the author and his assignee or assigns"; in both cases being entirely silent as to any special form of transfer or attestation, and using words which embrace assignees in law, and by devolution, as well as assignees by act of the parties. This is the part of the section which either confers or regulates the limited copyright, and because, in the penal part of the clause which follows, an exception is made in favour of those who are licensed by a consent in writing, attested by two witnesses, it has been twice held that the assignees in the first part must be such as claim under an assignment in writing so attested: *Power *v. Walker*;¹ *Davison v. Bohn*.² It is remarkable that *906 both these are cases merely of refusing a rule for a new trial, the latter mainly proceeding on the authority of the former, and neither of them fully argued; both, I must take leave to say with most sincere respect, founded on reasoning which is any thing but satisfactory.

Those who make light of the judgments in *Millar v. Taylor* and *Donaldson v. Beckett* can scarcely object to a respectful difference in opinion from the Judges who decided these latter cases; but, assuming them to be well decided, it is clear that they left many supposable states of circumstances unaffected by their decision. Suppose, with reference to the first branch of the statute of Anne, the case of a purchaser before it passed, or that of a legatee or executor or an administrator after it passed, surely it could not be

¹ 3 Maule & S. 7.

² 6 C. B. 456.

said, that they had no title because they claimed respectively under instruments without witnesses, or with only one. Indeed if the language of the decisions in both cases be looked to, it will be seen that the Judges had in contemplation only the precise cases before them respectively. They are, therefore, no authority where the facts are not only dissimilar, but fall under a different principle. Where the assignee and the licensee both claim under instruments executed in England, let the requirements of the statute as to one govern in regard to the other ; this is the principle of the two cases ; but where one purchases, or acquires, or becomes the assignee of the author's right, in a country in which the statute has no operation, the ground of the reasoning fails. Suppose an Englishman with undoubted English copyright should, in Milan, license another to print and sell so many copies in England, by an instrument valid in Milan, but without attestation by two witnesses, could it be maintained that

* 907 * such printing and selling would be piratical, and subject the licensee to the penalties of the Act of Anne or George ? Ricordi stands in this predicament ; he has been, by a conveyance valid in Milan, substituted for the author ; he does not claim under that conveyance English copyright, as existing at the time of the conveyance, and specifically conveyed by it, any more than if Bellini had died at Milan, having well bequeathed to him the unpublished manuscripts. But he claims to have been clothed by the conveyance from Bellini with all his rights, so that when he came to England he was, by the joint operation of it and the English law, entitled to all the rights of which the statute speaks. He is clearly within the enabling words of the statute ; he is the assignee of an author ; and even if these words may, in some cases, mean an assignee under an instrument in writing, attested by two witnesses, it has not been shown, or decided, that they must or can mean this in all cases. I think the contrary has been shown. Larger words, and less restrained, the Legislature could scarcely have used ; and on what sound principle are we to import a restraint by implication ?

I have already said, that I do not propose to go through the numerous cases on these two great branches of the subject, because they are fully before your Lordships. They must be admitted to be conflicting, and what is of more consequence, they may all be considered to be under review now in your Lordships'

House. They can, therefore, hardly serve to conclude the question. But I may be excused a word in respect of the two which last preceded the case now in judgment, because they were very fully argued, and the principal preceding authorities reviewed in them, and because they had been much discussed in the arguments at your Lordships' bar. I am desirous of seeing what they really profess to decide, and of respectfully considering * the weight of the arguments on which the judgments *908 proceed.

The first of these is *Chappell v. Purday*,¹ decided in 1845. In that case it will be found that the plaintiff claimed under two assignments ; the first by Latour alone, the second by Auber, Troupenas, and Latour : both, however, professed to be specific conveyances of copyright in England, not in an unpublished manuscript. At the dates of these respectively, the parties conveying had no such property as they professed to convey. The music being public at Paris, any one who heard it and could carry it off might have gone into any other country, might certainly have come into England and made it public here without infringing any right of property in the owner of the work at Paris. What was public at Paris any one procuring there might make public here without injury to the owner of the copyright there, because, merely as such owner, he had no right to exclusive publication here. The present case materially differs from that in this respect, that here the author, or his substitute, comes to this country with his work in such a condition that the English law of copyright, whether by common law or by statute, attached to it as much as if an Englishman had composed it in this country, and produced it from the first time from his writing-case.

It is remarkable that an inaccuracy, not immaterial, has crept into the reported judgment in this case. The question is stated to be,² " Whether a foreigner, residing abroad, and composing a work, has a copyright in England ? " and the question is answered in the same page, by saying, " that a foreign author residing abroad, and publishing a work there, has not any copyright here," as if composing and publishing were the same thing. It is not * necessary in the present case to contravene what is *909 said in that judgment respecting the intent of the British Legislature in the statutes of Anne and George 3 ; but with

¹ 14 M. & W. 303.

² 14 M. & W. 316.

great respect I desire to guard myself from being supposed to agree with these remarks in all particulars, and exactly as they are expressed. I think it would be more true to say that the statutes were intended to extend to all persons who could bring themselves within their requirements. Many of these may be inapplicable to a foreign author resident abroad, and thence it is logical to infer that the statute was not made for him. But I see no logical sequence in thence inferring that "the assignee of a foreign author, whether a British subject or not, may not come within their protection." There is nothing, as it seems to me, absurd in supposing that the author can possess a subject matter, which, from personal incapability of complying with the requisitions of the municipal law of this country, may be no property in him here; yet, which he may be able to pass to another not under the same incapability, in whom it may be property. And where the words of a statute are large, and admit of a liberal construction, I confess I do not see any legal or philosophical ground for giving them a narrow one. The political or economical ground, which was glanced at more than once in the argument of your Lordships' bar, that the more tightly we drew the limits round the law of copyright, the more likely we were to induce foreign governments to enter into treaties for international copyright, may be very cogent with aggrieved authors, but can surely have no place in influencing the decisions of a Court of justice, when determining what is the common law, or how the language of a statute is to be construed.

In *Cocks v. Purday*,¹ decided in 1848, the author was *910 *a foreigner, residing in the empire of Austria. By a contract, valid by the law of the country, he assigned to another foreigner, also resident abroad, the unpublished manuscript, and his copyright in it. This foreigner, still so resident abroad, sold the English copyright in the still unpublished manuscript to the plaintiff, resident in England. The instrument, clearly, would not have been valid for the purpose in England, but it was sufficient where made. The plaintiff made the proper entries at Stationers' Hall, and published in England, contemporaneously with a publication abroad. The questions were, whether there was a subsisting copyright? and whether the plaintiff was the proprietor of it? and both these the Court of Common Pleas, after a full

¹ 5 C. B. 860.

argument, and time taken to consider, adjudged in favour of the plaintiff. It is obvious that this decision goes beyond what is necessary for the present case. It was found as a fact, that by the foreign law, the owner of copyright might transfer it to another, for another country, even after publication ; but this assumption of extra-territorial power could not weigh at all in the decision of an English Court. The grounds of the decision are, that an alien amy, the author of a work, unpublished elsewhere, and first published by him in England, has copyright in that work by our law ; and that any one claiming under him, by an instrument valid for the purpose where made, before publication and first publishing here, is a good assignee, within the third section of 5 & 6 Vict. c. 45. Now I cannot perceive any thing in the language of this statute from which a more favourable intent, as to foreign authors, is to be inferred, than from the language of the 8th Anne, or 54th Geo. 3 ; but I do perceive in both these statutes, that language is used as to licenses less restricted than in the earlier statute, neither of them requiring the attestation of two witnesses to the license. If * that case be law, it is a clear authority * 911 for the defendant in error, and the case of *Chappell v. Purday*, for the reasons I have given, is no authority against him.

For the reasons I have given, I answer your Lordships' question by supporting the defendant's right of claim against the plaintiff in error ; and these reasons have led me to so much greater length than I contemplated when I began, that I am compelled to omit some parts of the argument, and some of the objections to it, which I should otherwise have much desired to lay before the House.

Second and Third. To your Lordships' second and third questions, I answer, for reasons I have already given, in the negative.

Fourth. If the work had been printed and published at Milan, before the assignment to the defendant, I think it would, according to the authorities, have made a difference. For that publication would have made it lawful for any one to publish in England. Bellini, or his assignee in Milan, had not directly copyright in England. If either of them brought an unpublished manuscript to England, then the English copyright arose ; but if the manuscript had been published before, and so put within the power and the right of all other persons as to copyright, out of the Milanese

territory, Bellini or his assignee would have been on the same footing as any one of the public. An Englishman would have had the same right to publish Bellini's work as he would to publish Dante's; and that state of things is inconsistent with any exclusive right in Bellini or his assignee.

Fifth. I think the answer to this question must be the same as to the fourth.

Sixth. I do not see that the limitation as to publication in this country made any difference.

Lastly. I think the learned Judge was wrong in directing the jury to find a verdict for the defendant.

* 912 * MR. BARON ALDERSON.—My Lords, I have considered the various questions which your Lordships have sent to her Majesty's Judges; and it seems to me that I shall answer them more clearly and distinctly by first stating what, according to my judgment, are the correct facts on which we are to proceed, and the true propositions of the law on this subject generally applicable to them (assigning my reasons for that opinion), and then adding my answers to each individual question separately, as corollaries from the general propositions of law, previously in my view of the case established.

And first, therefore, as to copyright after publication. It may be described as the sole right of multiplying copies of a published work. Whether this existed at common law, or was created by the statute for protecting literary property, seems not material for the present case. Indeed, it seems strange to my mind to discuss this question in the case of a foreigner who is not bound, so long as he remains abroad, by our common law at all. But whatever the difficulties may have been originally, I had supposed that it had been considered as now settled, that either copyright was originally created, or, at all events, is now entirely regulated by, and in this country depends on, the statute of Anne. I think that this law, by which it is given and regulated, must be considered as a territorial law, applying only to persons who are under the liegeance of this country, unless there is something in the statute to give a more extensive operation to its provisions. This is to be shown by those who wish so to extend it; it is not sufficient for this purpose to show that there are expressions which may be so construed. They should go further, and show that they must be

so. And this cannot be done. I think, therefore, that this, which is, in truth, a profitable monopoly, is a species of territorial property, which must * be regulated, as to its transmission, extent, and duration, by the law of this country, which created and regulates it. * 913

In the case of an alien amy, he may, it is true, make himself capable of obtaining this right, by coming into this country, and first publishing his work here. But until he does that, he cannot, I think, have the right at all, and consequently cannot transmit what he has not yet acquired.

The learned counsel for the defendant in error, indeed, admitted very candidly that the statute of Anne was not intended to have any extra-territorial effect. But then they argued that this did not decide the question, because, as they said, that here, the assignee of the copy of the manuscript, before that time unpublished altogether, came into this country with that manuscript, and had then all the rights of publishing or refusing to publish, which the author himself originally had, and *inter alia* the copyright which the statute of Anne gave to the author or his assignee. And, in truth, this was the sum of their argument. Now, it may be safely admitted that the assignee had the sole and exclusive power to the individual copy of the manuscript assigned to him, and consequently the sole and exclusive power of first printing and publishing it. But whether that would give him the copyright is a very different thing.

The Act gives that right to the author and to the assignee, not of the manuscript, but of the copyright. And if the author has it only in a qualified way, viz. provided he be a British subject, or, being an alien, may become so by residing in England at the time when he assigns his right, then the assignee cannot possess by assignment what the author never had to assign, until he complied with the condition on which alone he could obtain it; and that is in truth the case here.

* But there is a further difficulty in the present case. * 914 Here the author, Bellini, had, as is stated in the bill of exceptions, a copyright, by the law of Austria, in the work. Now the law of Austria could give no right extra-territorial, or at least none which could be enforced here.

The right, therefore, of Bellini, which he assigned, was this Austrian or Italian copyright, capable of being there, and there

only, enforced. And this he assigned to Ricordi, and nothing else. Ricordi does not assign this to the plaintiff, but he assigns to Boosey a right of solely publishing in England. This right he had not; it was no part of his Austrian copyright. But even if his copyright had been general, this is not an assignment of the copyright at all; it is at most a local license from the assignee of the copyright to Boosey, with a covenant that he alone shall be allowed to publish the work here. Boosey, therefore, cannot, as I think, be treated as an assignee of the copyright of the author, for he has not the same right of publication as the author himself, which an assignee of the copyright has and must have. A licensee to publish solely within a limited district cannot, I apprehend, maintain this action at all, or, in any event, cannot do so in his own name, which Boosey is attempting to do here.

Again, in the judgment below it is said that Bellini having the copyright, it cannot be necessary that he should come to England, and that he may well act by agent in publishing here. But this is answered by the fact, that Ricordi in publishing here on his own account, and for his own profit, cannot, without a total disregard of all principles, be treated as an agent of the author who has assigned all his rights to him.

For these several reasons, therefore, — first, that Bellini had no English copyright which he could assign so long as he resided out of England, and, secondly, that he never * did assign to Ricordi any thing more than what the Austrian law gave him; thirdly, because Ricordi never assigned to Boosey (even if Bellini had a general copyright, and had assigned it to him) any thing more than a mere local license solely to print and publish in England, which would not enable him to maintain an action in his own name,—I am of opinion that the plaintiff in this case could not recover, and that the fact of his publication of the work in England gave him no right of action against the defendant.

I think, also, that it is too late now to question the authority of the two decisions, *Power v. Walker*,¹ and of *Davidson v. Bohn*,² by which the assignment from the author, in order to be valid, must be executed in the presence of two witnesses, and be in writing. But for the latter case it might have been said that the 54 Geo. 3, c. 156, passed almost immediately after the case of *Power v.*

¹ 3 Maule & S. 7.

² 6 C. B. 456.

Walker, had, by taking away one principal reason for that decision, made it doubtful whether the assignment required now two witnesses. But *Davidson v. Bohn* is long subsequent to the 54 George 3, and is expressly in point. And the difference between the two provisions in 8 Anne and 54 George 3, the latter of which only in words requires the license to be in writing, and not, as in 8 Anne, that it should be attested by two or more witnesses, does not seem necessarily to decide this point. The two clauses may stand together, and therefore the one does not necessarily repeal the other. I think, therefore, that *Davidson v. Bohn* may still be considered as governing this point ; and certainly if it may, it is decisive of the question. For, granting that Bellini had a copyright which extended to England, it is clear that he must assign according to English law, in order to pass his English copyright ; and then it is also decided by these cases that the assignment must be *in writing, and attested by two or more witnesses. * 916 Now the case finds that it has not been so assigned. Then the copyright did not pass to Ricordi, and if it did not, he could not convey what he never had to the plaintiff. Each of these propositions flows from the other. If the first proposition, therefore, is true, the consequences inevitably follow.

I will now, with your Lordships' permission, shortly advert to the main cases which have been cited in the argument. I think there is no preponderance of authority against the above view of the case. It is said, and there is no doubt of it, that for injuries to his personal property or to his person, an alien amy may maintain an action in this country. The case of slander to his character, *Pisani v. Lawson*,¹ was cited for this, and the running down the ship of an alien amy on the high seas is another instance. Nobody ever doubted this, since these decisions at all events ; but I am at a loss to see what they have to do with this question, which is, whether an alien amy ever had the property which he has assigned here, and whether the plaintiff's right as the assignee of his assignee can be supported. This is an Englishman suing, and the contest is only as to the property. Those cases turn upon the question whether the alien amy can sue, the property injured being admitted to belong to him.

I come to the other cases, and it is marvellous to see how little real authority there is on either side. The first is a dictum of

¹ 8 Scott, 182, 6 Bing. N. C. 90.

Lord Thurlow, in an argument as counsel at the bar, in *Tonson v. Collins*.¹ Now, the argument of counsel, be he ever so eminent, is really nothing ; for we do not know that it was his real opinion,

— it was useful to his case so to state the law. I think we
* 917 may pass * over that as an authority. So, again, we need

not be much embarrassed by *Bach v. Longman*,² for many reasons. It amounts to this, that Baron Wood did not make this point there. Now, in the first place, the case did not require it ; the case was sent by the Court of Chancery only to ascertain whether a musical composition was a book. The authority then amounts to this, that in arguing that question, Baron Wood said nothing about a point which had no relation to the matter ; but if he had made the point, the fact would have probably given an answer to it, for it is matter of history that Sebastian Bach was a foreigner residing in this country, and an artist in the service of the King of England. Yet this case was the authority on which the dictum of Lord Abinger was founded in *D'Almaine v. Boosey*,³ which after all is only to this effect, that a foreigner residing here and publishing may have a copyright, which is not now disputed, and is also not the point we are discussing here. *Clementi v. Walker*,⁴ may be classed with these authorities. As yet we have nothing like a decision on the point ; the cases in Simons may be set off against each other. Then came the case of *Chappell v. Purday*,⁵ in which is a distinct opinion on this subject. That opinion was no doubt questioned in a very able judgment in *Cocks v. Purday* ;⁶ but in neither of those cases does this exact point seem to have been precisely decided. And in *Boosey v. Davidson*,⁷ the Court of Queen's Bench simply adopts the view of the Court of Common Pleas in *Cocks v. Purday*. After all, this case is almost untouched by previous authority, and your Lordships have now to

decide whether the judgment of the Court of Exchequer
* 918 here, or * that of the Court of Exchequer Chamber, most accords with general principles. On this I have already stated my reasons, and the conclusions I draw from them, which have induced me to answer your Lordships' first question in the negative.

¹ 1 W. Bl. 301, 321.

[•] 14 M. & W. 303.

² Cowp. 623.

[•] 5 C. B. 860.

³ 1 Younge & C. Exch. 288.

[†] 13 Q. B. 257.

⁴ 2 B. & C. 861.

The second question of your Lordships, I answer thus: if the assignment to Ricordi had been made as suggested, it would have removed one difficulty in the case, but the result would be the same, that the plaintiff could not recover.

To the third question, I give the same answer as to the second question.

As to the fourth question, it seems admitted by the Court below, that according to the cases, a previous publication abroad would have put an end to the plaintiff's right. But why should it do so if a foreigner and a British subject are in *pari casu*, as the Court below seems to say they are? A publication by an English author abroad does not, I apprehend, prevent his acquiring a copyright in England. It may, possibly, affect its duration; for the statute of Anne does not date the commencement of the term given from the first publication in England, but from the first publication. The clauses as to entry in Stationers' Hall, which no doubt point to a publication in England, are added to give a new and further remedy against those who infringe the right, and this remedy cannot be had till that is done. The fact that a previous publication abroad takes away the right of a foreigner seems to me to show that the law applies only to persons who when they first publish in England have the right of then acquiring an English copyright. This qualification is everywhere, at all times, and under all circumstances, possessed by a British subject; but if it is not possessed by an alien amy till he comes to England with an unpublished work, he *cannot, if he has before *919 published abroad, acquire by a publication here which is not the first publication a copyright in England. This is admitted to be so in fact, and this seems to me to show that the English subject and the alien amy are not in *pari casu* till the latter comes to this country.

To the fifth question, I answer the same as to the fourth question.

To the sixth, I answer that I think the suggested fact would make a difference. For then it would have been an assignment of the copyright, and not a mere license to publish. But, as in the second question, I also wish to add, that I think it only removes one out of several fatal objections to the plaintiff's case.

To the seventh, I answer that I think the direction of the Judge and the verdict were right.

MR. BARON PARKE.—In answer to the first question proposed by your Lordships, I have to state that my opinion is, that the defendant in error, under the circumstances stated, had no right of action against the plaintiff in error.

In the first place, I am of opinion that Vincenzo Bellini, who was an alien, and at the time he composed his work, the piracy of which is complained of, and from thence to the time of the first publication thereof in England, was resident at Milan, never had any English copyright, nor could have had, by a first publication by himself of his work in England. The term "copyright" may be understood in two different senses. The author of a literary composition which he commits to paper belonging to himself has an undoubted right at common law to the piece of paper on which

his composition is written, and to the copies which he
* 920 chooses to make of it for himself, or for others. * If he

lends a copy to another, his right is not gone ; if he sends it to another under an implied undertaking that he is not to part with it, or publish it, he has a right to enforce that undertaking. This sense of the word "copyright" has nothing to do with the present question, though, in the course of the argument, it has been sometimes used in that sense, when it was convenient to do so, particularly when it was contended that a copyright existed at common law. The other sense of that word is, the exclusive right of multiplying copies ; the right of preventing all others from copying, by printing or otherwise, a literary work which the author has published. This must be carefully distinguished from the other sense of the word, and is alone to be looked at in the discussion of this case, and it would tend to keep our ideas clear in determining this question, if, instead of copyright, it was called the exclusive right of printing a published work, that being the ordinary mode of multiplying copies.

Whether such an exclusive right belonged to any one at common law is a question on which the highest authorities have differed. If it were necessary to give an opinion on that question, I should say that the rational view of the subject is most clearly against the existence of this right ; and I believe that the weight of authority, taking into consideration the opinions expressed since the decision of the great cases of *Millar v. Taylor*,¹ and *Donaldson*

¹ 4 Burr. 2303.

v. *Beckett*,¹ and of *Hinton v. Donaldson*,² quoted by Mr. Quain, at your Lordships' bar, is likewise against it; and so is the opinion of foreign Judges administering English law. The expressions used by Lord Kenyon in *Beckford v. Hood*,³ evidently show that such was his opinion; and *Lord Ellenborough, in *Cambridge University v. Bryer*,⁴ shows an inclination of opinion to that effect, to which may be added the authority of the majority of the American Judges in *Wheaton v. Peters*,⁵ cited by my brother Byles.

But whether such an exclusive right of multiplying copies in this kingdom exists or not at common law in favour of a subject of this country, it is clear that it does not exist in favour of a foreign author living abroad. By the municipal law of his own country he may have such a right, but that law has no extra-territorial power, and does not give him a right here. And it seems to me extravagant to contend that by natural law, or, as Lord Mansfield says, *Millar v. Taylor*,⁶ by "the principles of right and wrong, the fitness of things, convenience and policy, and therefore by the common law," or by the comity of nations, the subject of one country, on the publication of his works in other countries, has an exclusive right to the multiplication of copies in those countries, and can oblige the Courts in each country to protect him in the exercise of that right. This point has not been disputed in the argument at your Lordships' bar.

The only question, then, is, whether this exclusive right is given to a foreigner, resident abroad, by virtue of the statute law; and the statutes in force at the time applicable to this case are the 8th Anne, c. 19, and the 54th Geo. 3, c. 156. If a judicial construction had been put on these Acts, by a direct and deliberate decision of a Superior Court, we, if sitting in another Court of coordinate jurisdiction, should probably feel ourselves bound by that construction, leaving it to be questioned in a Court of Error; but, as advising the highest tribunal in the land, we should not consider ourselves precluded by *one judgment, of an inferior tribunal, from putting the construction which we think ought to be given to the statutes: we should require more. But, in truth, before the case of *Chappell v. Purday*, in the Court

¹ 4 Burr. 2408, 2 Brown P. C. 129.

* 16 East, 317.

² Dict. of Decisions, Tit. Literary Property, 8307.

* 8 Pet. 591.

³ 7 T. R. 620, 627.

* 4 Burr. 2398.

of Exchequer, 1845,¹ and of *Cocks v. Purday*,² followed by that of *Boosey v. Davidson*,³ and *Boosey v. Purday*,⁴ the first and last of which are conflicting with the two others, there is no authority on this subject which, properly considered, ought to be of any weight at all in deciding this case.

All the authorities, prior to the first of these cases, have been collected in the reported judgment of Lord Campbell, in the Exchequer Chamber,⁵ now brought up by writ of error into your Lordships' House. Of the authorities on which that judgment relies, the first in order of time is that of *Tonson v. Collins*.⁶ The supposed authority is that of Lord Thurlow, who, when he was counsel, in arguing that there was no copyright at all at common law, remarked that some part of the special verdict was out of the case, as it was of no consequence whether the authors were natural-born subjects or not, because the right of property, if any, was personal, and might be acquired by aliens. The special verdict, in the part referred to by Lord Thurlow, states that the "*Spectator*" (the work pirated) was an original composition by natural-born subjects, resident in England. This is, surely, no authority whatever; it is the mere dictum of counsel, and, after all, only amounting to this, that if authors resident in England composed a work, it matters not as to the right to copyright whether they be natural-born subjects or not, — a point which no one

*923 has disputed. The *second is that of *Bach v. Longman*.⁷

It is said that in that case, Baron Wood, at the bar, although the plaintiff was a foreigner, did not take the objection. As little can the implied admission of counsel be an authority as his positive dictum; but, in truth, it does not appear, except by conjecture from the name, that the plaintiff was a foreigner. Nor does it appear in any manner, if he was a foreigner, that he was not resident in England when he published his work. It may be rather inferred that he was, for he applied for and obtained the Royal license for the sole printing and publishing the work for fourteen years; and I believe it is well known that he was organist in the Chapel Royal. Further, the sole question in the case sent from the Court of Chancery to the Court of King's Bench was, whether

¹ 14 M. & W. 303.

⁶ 6 Exch. 580.

² 5 C. B. 860.

⁷ 1 W. Bl. 301 – 321.

³ 13 Q. B. 257.

⁸ Cowp. 623.

⁴ 4 Exch. 145.

a musical composition was a work within the Statute 8th Anne. Therefore it was impossible for Baron Wood to have made such a point, if he thought it tenable. These two cases do not furnish the semblance of an authority on the question in this case. *D'Almaine v. Boosey*,¹ before Lord Abinger, in which he granted an injunction against the infringement of a foreigner's copyright, was decided immediately on the argument, without time taken to consider, and entirely on the supposed authority of *Bach v. Longman*, the circumstances of which had evidently escaped the recollection of the learned Judge, for the point never was, or could be, argued or decided in that case. The case of *D'Almaine v. Boosey*, therefore, is no authority whatever. Then followed the case of *Delondre v. Shaw*,² which was a bill to restrain the defendants from pirating the plaintiff's trade marks. The Vice-Chancellor Shadwell remarked, that a Court does not protect the copyright of a foreigner. * It is certainly a dictum * 924 only, but, as far as it goes, is against the claim of the plaintiffs below ; but little reliance can be placed on it, for the learned Vice-Chancellor afterwards, in *Bentley v. Foster*,³ expressed a different opinion, and directed the plaintiff to bring an action to try the right. The case of *Clementi v. Walker*⁴ was decided on the ground that, before the author, a foreigner, came to England, and assigned, or rather attempted to assign, his copyright to the plaintiff, the work had been published in France, and so there was no first publication in England. The point, whether a foreigner who resided continually abroad, as the author in the present case did, could have a copyright, did not arise. The only remaining case prior to the recent decisions, already mentioned, is *Page v. Townsend*.⁵ That arose on the Acts for the protection of engravers, 8 Geo. 2, c. 13, § 1 ; 7 Geo. 3, c. 38 ; 17 Geo. 3, c. 57. The Vice-Chancellor (Shadwell) held, that the object of the Acts was to protect works designed or engraved in England ; but as he held that the last statute, in which these words were expressed, was in *pari materia* with the others, these words were to be implied in the other Acts ;⁶ and this case cannot be relied upon as an authority either way.

¹ 1 Younge & C. Exch. 288.² 10 Simons, 329.⁴ 5 Simons, 395.² 2 Simons, 237.⁴ 2 B. & C. 861.⁵ See an able Essay on the subject of "The Laws of Artistic Copyright, by D. R. Blaine, Esq., Barrister at Law."

Looking at the state of the decisions up to this time, it is out of the question to say that there was any authority of the most trifling value, still less any binding authority, as to the construction of the Copyright Acts. Then occurred the case of *Chappell v. Purday*,¹ in which the Court of Exchequer intimated the opinion, that copyright depended on the proper construction of the Statutes

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the opinion of the Court was, that those statutes gave a copyright only to British subjects, either natural born or by residence. The Court of Common Pleas took a different view in the case of *Cocks v Purday*,² though, in looking at the report, I cannot find that the Court addressed much, or indeed any, attention to the construction of the statute of Anne, upon which the right to copyright is founded, and on which construction alone the Court of Exchequer formed its opinion. The Judges seem to have supposed that the Court of Exchequer had doubted upon the right of an alien friend to personal property, and all other personal rights in England, a point which that Court had not the least idea of bringing into question. This decision of the Court of Common Pleas was followed by the Court of Queen's Bench, in *Boosey v. Davidson*,³ without further comment. In this state of conflicting authorities, the Judges in the Court of Exchequer decided the case of *Boosey v. Purday*,⁴ acting upon their own opinion; and in conformity with the authority of that case the law was laid down by Lord Cranworth, on the trial of the cause now before your Lordships, and that opinion was excepted to.

This review of the authorities appears to me to show, that the only question now is, as to the true construction of the Statute 8 Anne, c. 19 (for the 56th Geo. 3 does not change it). Copyright, as it affects this case, depends upon this Act, and this high tribunal is called upon to construe it, entirely unfettered by decision. What, then, is the true construction of the statute of Anne, and of the 54th Geo. 3, c. 156? The statute of Anne is entitled, "An

Act for the Encouragement of Learning, by vesting the
*926 * Copies of printed Books in the Authors and Purchasers of such Copies"; and, after reciting the practice of publishing copies without the consent of the authors or proprietors, for pre-

¹ 14 M. & W. 303.

² 13 Q. B. 257.

³ 5 C. B. 860.

⁴ 4 Exch. 145.

venting such practices, and for the encouragement of learned men to compose and write useful books, it provides that the author, or his assignee, shall have the sole liberty of printing such books for the term of fourteen years, to commence from the day of first publishing the same. The Act of 54 Geo. 3, c. 156, recites that it will afford further encouragement to literature if the duration of such copyright should be extended, and it extends the fourteen years to twenty-eight, and if the author be living, till the end of his life. The object of these Acts most clearly is, as is expressed in the Acts themselves, for the encouragement of learning, by encouraging learned men to compose and write useful books, by giving them as a reward the sole right of printing their works for a term. It is clear that the Legislature has no power over any persons except its own subjects, that is, persons natural-born subjects, or resident, or whilst they are within the limits of the Kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must, *prima facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect.

General words have been held to have such a limitation. The Acts relative to legacies have been confined to English domiciled subjects, — *Thomson v. The Advocate-General*,¹ *Attorney-General v. Forbes*,² and in *Arnold v. Arnold*³ Lord Cottenham observes, “that when the Act speaks of any will of any person, and of the legacies being payable out of the personal estate, it must be considered as speaking of * persons and wills and personal * 927 estates in this country, that being the limit of the sphere of the enactment.”

When, therefore, the Legislature offers to authors a reward for their ingenuity and labour, at the expense of the subjects of the realm, in the shape of an exclusive right of printing the result of those labours for a term, and so making the acquisition of the printed work dearer to all over whom their authority extends, I cannot doubt that it was meant to benefit English authors only. Whatever construction ought to be put upon this statute in the time of Queen Anne, ought to be put now. We must read and understand it exactly in the sense we should have done then.

¹ 12 Clark & F. 1.

* 2 Mylne & C. 256, 270.

² 2 Clark & F. 48.

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¹ 12 Clark & F. 1.

² 2 Mylne & C. 256, 270.

³ 2 Clark & F. 48.

The construction cannot vary from time to time, according to the prevailing opinions as to the proper course of policy to be pursued in our intercourse with strangers. It is rather a startling proposition that the Parliament of Queen Anne meant to foster and encourage foreign authors at the expense of the British public. It is said that learning would be encouraged by the introduction of foreign books which might not otherwise be imported, but it is expressly declared in the Act itself, that it is for the encouragement of learned men to compose and write, not for the encouragement of the importers of books. It would be of small advantage indeed to the community, and an inadequate reward to the first importer, to allow him to have a monopoly, and thereby increase the price of the book to the public; for if the book was of real value, doubtless it would be imported for the use of British readers. And if the introduction of books had been the object, why not give the exclusive right of printing to the first importers? It was indisputably the intention of the framers of the Act to reward authors, not importers; and what benefit could the British public derive from the encouragement of foreign authors?

*928 * I must say that I feel no doubt that the benefit is to be given to English authors only, and in that category are to be placed not merely subjects of the Crown by birth, but subjects by domicile or residence, or even, perhaps, by personal presence here at the time of composing the work, or at least at the time of first publication; for even those owe a temporary allegiance, and are bound by our law, and probably ought to have a corresponding benefit,—questions now not necessary to be considered.

It is no answer to the argument that the Legislature meant to give the privilege only to English authors, that if residence or personal presence here would be enough, it could be easy to procure that title by taking the trouble of a journey to England, and remaining for a short time, and thus the intended benefit to British subjects would be evaded. It might, it is true; but then there would be some cost of time and trouble, much more in the time of Queen Anne than now; and it is no valid argument against the construction that the Legislature meant to confine the reward to subjects, that there might be some cases in which that intention could be defeated with no great trouble. That is no reason for holding that aliens should enjoy the right without any trouble at all. It would be rather an argument against construing the Act

in favour of persons who came into England, not to reside, but merely to publish.

It is said that the same construction ought to be put on the Copyright Acts as upon the Patent Acts. I think not. The Patent Act, 21 James 1, c. 3, was in restraint of the prerogative, the King having always had the power of granting monopolies of new inventions, as the chief guardian of the common weal, for the sake of the public good; and this power extended to new discoveries only, "to wit, to one who hath brought in a new invention and new trade * within the Kingdom," — *Cloth-Workers of Ipswich Case*;¹ and the Statute 21 James 1, c. 3, abolishes monopolies, except grants for the sole working or making of new manufactures within the realm, to the true and first invention of such manufactures, which are of the same force as at common law. Taking the common law and the exception of the statute together, it could not be doubted that a patent could be granted to one who first introduced a new manufacture from beyond sea, "for the statute speaks of new manufactures within the realm"; and if they are new here, they are within the statute, and new devices useful to the Kingdom, whether learned by travel or by study, it is the same thing, and therefore it was so decided in *Edgeberry v. Stephens*.² As the King has the discretion to give the patent right to whom he will at the common law, he probably may, in respect of the value of the invention, give it to an alien resident abroad, though that point has never been decided. But the Crown is not bound to give it to any person whatever; it is entirely in its discretion. But in the case of copyright there is no power of selection in the Crown, and an alien, if entitled under the Act on that subject, would be entitled absolutely, whatever the value of his work or its merit may be. The right is given to every author.

There is an argument mentioned at the bar, arising out of the International Copyright Act, 1 & 2 Vict. c. 59, repealed and re-enacted, with additions, by 7 Vict. c. 12,³ which ought to be noticed. It is that if aliens living abroad could obtain a copyright under those Acts by first publication in England, and could make the first publication by the new device of simultaneously publishing abroad and in England (a device of very question-

¹ Godb. 252.

² See also 15 & 16 Vict. c. 12.

³ 2 Salk. 447.

* 930 able *validity, if the state of the authorities permitted it to be questioned), there would be an end of the advantages which we could offer to foreign countries, the United States of America for instance, who recognise no copyright but in citizens of those States, as an equivalent for a copyright in that country, a copyright of incalculable advantage to all British authors, the value of whose works would be greatly multiplied from the increased number of readers who speak the same language. This is quite true at present. If the decision of the Court of Exchequer Chamber is law, every American author can obtain the right of sole publication of his own work here, if he takes care to publish it on the same day in his own country. But our decision ought not to proceed on the ground of public policy, at all events not in the sense of political expediency, which this is, but we must give that construction which we think properly belongs to the Acts of Parliament, on which the right depends.

I therefore, for these reasons, come to the conclusion, that Bellini, being resident abroad from the time of the composing to the time of the publication of his work, never did or could acquire an English copyright. This is a sufficient answer to the first of your Lordships' questions ; for if he never had a copyright, the defendant in error, who claimed only under him, could maintain no action for infringing the supposed right. But, in the next place, supposing the above reasoning to be incorrect, and that Bellini had an English copyright by first publication by him, or his assigns, in England, I am of opinion that there is a defect in the title of the defendant in error. First, according to the statement introducing your Lordships' first question, Bellini, who had a copyright by the laws of Milan, assigned that copyright only to Ricordi, under whom the defendant in error claimed ; such as

* 931 signment, * therefore, passed the Milanese copyright only.

Secondly, if the terms of the assignment were capable of transferring all his copyright, wherever it existed, and consequently the English copyright, the assignment to Ricordi would be void, as not being made in the presence of two witnesses, according to the case of *Power v. Walker*,¹ and of *Davidson v. Bohn*,² if these cases are applicable to transfers since the 54th Geo. 3, c. 156. These cases decided that such a form of assignment was necessary in English copyrights transferred in England, on the ground that,

¹ 3 Maule & S. 7.

² 6 C. B. 456.

as the statute of Anne required a simple license to be executed in the presence of two witnesses, it was reasonably to be inferred that the Legislature meant that the transfer of the whole interest should not pass without an instrument of similar solemnity.

A question now, however, arises, whether, since the 54th Geo. 3, c. 156, and before the 5th & 6th Vict. c. 45, an assignment in writing only, without attesting witnesses, might not be sufficient. This point was not raised in *Davidson v. Bohn*, probably because the assignment therein mentioned was before the 54th Geo. 3. That statute does not expressly repeal the clause of the Statute of 8th Anne, from which the necessity of attesting witnesses arises. The question is, whether it impliedly repeals it. The provision in the statute of Anne is, that a license shall be in writing, signed in the presence of two witnesses. In the Statute 54 Geo. 3 it is that it shall be in writing. But both being affirmative enactments, not inconsistent with each other, it may be said at first sight that there is no implied repeal. The Statute 5 & 6 Vict. leaves no doubt, for it expressly repeals the whole of the statute of Anne, and an assignment may now be undoubtedly made in writing, unattested, as well as by entry in the registry * of the * 932 Stationers' Court. But I also think, after much consideration, that the 54th of George the 3d impliedly repeals the statute of Anne. It provides that all booksellers and others, who print and publish without the consent, in writing, of the proprietor, should be liable to an action. It implies, therefore, that if any bookseller or other person prints and sells with any license, in writing, he is not to be liable to an action. Any license, therefore, in writing, being sufficient to give a man authority to print and sell, and, therefore, to give him a partial interest, it follows, according to the reasoning in the case of *Power v. Walker*, that there's no longer any ground for requiring more than an assignment in writing, in order to give the entire interest in a copyright to an assignee. Assuming it, however, to be the law, that at the time of the transfer in question, an attested instrument was required in England, then the assignment of an English monopoly, being the exclusive right of printing and publishing within the English territory, clearly required to be attested by two witnesses.

Although according to international law, generally speaking, personal property passes by transfer conformably to the law of the domicile of the proprietor, yet if the law of any country requires a

particular mode of transfer, with respect of any property having a locality in it, that mode must be adopted,—Story, *Conflict of Laws*,¹ and Lord Kenyon, in *Hunter v. Potts*.² The sole right of printing copies of a work, and publishing them within the realm, is clearly of a local nature, and, therefore, must be transferred by such a conveyance only as our law requires.

I answer the second and third questions in the negative, that the attestation of the deed in each case would have made no difference, because I am of opinion that Bellini himself never

* 933 could have had any English copyright, supposing * that he had remained at Milan from the time of his composing to the time of the first publishing his composition, and, therefore, his assignees, by whatever form of conveyance, and with whatever solemnities they might claim, would have none.

For the same reason I answer the fourth and fifth questions in the negative. It may be added, that a prior publication abroad would, according to the case of *Clementi v. Walker*,³ at all events prevent the plaintiff from recovering.

To the sixth question I answer, that if the assignment to the defendant in error had not contained the limitation as to the publication in this country, it would have made no difference in that respect, being of opinion that the defendant had no copyright to assign. But if he had such a right, it was the statutory right, by 54 Geo. 3, c. 156, to the sole privilege of printing copies in the United Kingdom, or any part of the British dominions. And I am of opinion that this is an indivisible right, and the owner of it cannot assign a part of the right, as to print in a particular county or place, or do any thing less than assign the whole right given by the English law. It seems to me that it is analogous to an exclusive right by patent, which cannot, I apprehend, be parcelled out, though licenses under it may.

And, lastly, looking at the record, as set out in the bill of exceptions, the learned Judge who tried the cause was, in my judgment, perfectly right in directing the jury to find a verdict for the defendant.

The only doubt arising from the form of the question astly proposed by your Lordships is, that in the record a certified copy of the register book of the Company of Stationers is said to have

¹ §§ 383, 398.

² 4 T. R. 182, 192.

³ 2 B. & C. 51.

been produced ; and that by * the 5th & 6th Vict. c. 45, * 934 § 11, is made *prima facie* proof of proprietorship therein expressed, but subject to be rebutted by other evidence ; and therein arises a question, whether the other evidence produced by the plaintiff below himself does rebut it. I am of opinion that the evidence of Bellini, being a foreigner, for the reasons above mentioned at length does rebut it ; for a foreigner resident abroad cannot have it, and therefore the certified copy of the entry proves no title in the plaintiff. And if your Lordships shall be of opinion that a foreigner resident abroad has such a copyright, I think the evidence set out on the bill of exceptions does sufficiently rebut the title of the plaintiff below ; because it sufficiently appears that the conveyance to the plaintiff of the right in the United Kingdom, was the assignment under which the plaintiff claims. But he has no title, because a part of a copyright cannot be assigned. The other objection, that Bellini did not assign the whole of his copyright, but only the copyright in Milan, does not, I think, sufficiently appear, so as to rebut the *prima facie* inference arising from the evidence of the entry.

On the whole, I think that the learned Judge was perfectly right in his direction to the jury.

LORD CHIEF BARON POLLOCK.— My Lords, in answer to the first question proposed by your Lordships, I have to state my opinion that, assuming the facts stated in that question to be true, the publication by the plaintiff in error did not give the defendant in error any right of action against him ; and the grounds upon which I have formed that opinion are such, that, in answer to the second, third, fourth, fifth, and sixth questions, I am of opinion that (assuming the facts to be true which in those questions respectively are supposed), they would * not have made any * 935 difference. And, lastly, looking to the record, I am of opinion that the learned Judge who tried the cause was right in directing the jury to find a verdict for the defendant (now the plaintiff in error).

The answers to these questions depend upon some more general propositions, as to which I propose to state my opinion to your Lordships.

The first is, whether, by the common law of this country, the author of any published work has an exclusive right to multiply

copies, that is, is entitled to what is commonly called copyright ? This is a question upon which very great names and authorities are arrayed on either side. Some of the greatest lawyers have been of opinion that by the common law such an exclusive right existed, while it has been denied by others of at least equal authority. The whole question is most ably and elaborately argued and discussed on both sides, and all the authorities then existing are collected with great research in the celebrated case of *Millar v. Taylor*;¹ and I entirely agree with my brother Parke, that the weight of mere authority, including the eminent persons who have expressed an opinion on the subject since the case of *Mill r v. Taylor* was argued, is very much against the doctrine of a copyright existing at the common law.

In Mr. Justice Willes's judgment (giving a very able, elaborate, and learned exposition of the whole subject) he appears to think that, because upon general principles he has satisfied himself of the justice and propriety of an author possessing such a right, therefore by the common law it exists. The passage is a remarkable one, and shows what were his views of the common law, and

what, probably, he thought would not be considered strange
*936 or novel by the rest of the Judges. It is this : * he is speaking of the allowance of "copy" as a private right ; and he says, "It could only be done on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent." My Lords, I entirely agree with the spirit of this passage, so far as it regards the repressing what is a public evil, and preventing what would become a general mischief ; but I think there is a wide difference between protecting the community against a new source of danger, and creating a new right. I think the common law is quite competent to pronounce any thing to be illegal which is manifestly against the public good ; but I think the common law cannot create new rights, and limit and define them, because, in the opinion of those who administer the common law, such rights ought to exist, according to their notions of what is just, right, and proper. This ground or method of arguing for a common-law right has not been adopted at your Lordships' bar. The ground taken by the learned counsel for the defendant in error, on this part of the case, has been that an author has the same

¹ 4 Burr. 2803.

property in his composition, being his own creation or work, as a man has in any physical object, produced by his personal labour. If such a property exists at common law, it must commence with the act of composition or creation itself, and must, as it seems to me, be independent of its being reduced into writing ; it must also be independent of whether the author is willing to furnish copies at a reasonable price (which Mr. Justice Willes made one of the points in his judgment). If it is the author's property, he may give or withhold it, as he pleases ; he may communicate it to the public with a liberal or a niggardly hand, or withhold it altogether. And the same principle must be applicable to every other creation, invention, or discovery, as well as a * poem, a history, or any other literary production. It must apply to every other offspring of man's imagination, wit, or labour ; to discoveries in science, in the arts, and manufactures, in natural history ; in short, to whatever belongs to human life. An ode, composed and recited by an ancient bard at a public festival, is as much the creation of his genius, and is published by the recitation, though not in the same degree, as the poem of a modern author, printed and sold in Paternoster Row. The speech of the orator, the sermon of the preacher, the lecture of the professor, have no greater claim to protection, and to be the foundation of exclusive property and right, than the labours of the man of science, the invention of the mechanic, the discovery of the physician or empiric, or indeed the successful efforts of any one in any department of human knowledge or practice. And it is difficult to say where, in principle, this is to stop ; why is it to be confined to the larger and graver labours of the understanding ? Why does it not apply to a well-told anecdote, or a witty reply, so as to forbid the repetition without the permission of the author ? And, carried to its utmost extent, it would at length descend to lower and meaner subjects, and include the trick of a conjurer, or the grimace of a clown.

Weighing all the arguments on both sides, and looking to the authorities up to the present time, the conclusion I have arrived at is, that copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind assembled in communities, but is a creature of the municipal law of each country, to be enjoyed for such time and under such regulations as the law of each state may direct, and has no existence by the common law of England. It

* 938 would follow from this, that copyright in *this country depends altogether on the statutes which have been passed on this subject; and the next question is, What is the true construction of the various statutes; viz. the 8th Anne, c. 19, and the 54th Geo. 3, c. 156, now merged in the 5th & 6th Vict. c. 45?

The laws of foreign nations have no extra-territorial power, so as to give to Bellini a copyright in this country, on the ground that he possessed such a right at Milan; and the English statutes on copyright do not, according to their true construction, in my judgment, apply to a foreign author residing abroad, or to his assigns.¹ Such foreign author is not within the scope and meaning of the Acts of Parliament referred to, and probably it is better that the rights of foreigners should be the subject of treaty confirmed by Act of Parliament (by which means the corresponding or correlative interests of British subjects in foreign countries may be secured); but whether better or not, I am of opinion that neither Bellini nor his assigns acquired any copyright in this country. This question has been twice lately before the Court of Exchequer; first, in the case of *Chappell v. Purday*,² and again in the case, more exactly resembling the present, of *Boosey v. Purday*.³ Each of these cases was fully argued, and the deliberate and unanimous judgment of the Court was delivered by myself. I have discovered no reason and have heard no argument that induces me to alter the judgment pronounced in the latter case; and after the opinions that have been already delivered, examining the various cases, I do not think it is necessary to do more than refer to the judgment already pronounced by the Court to which I belong, in the case of *Boosey v. Purday*, for the grounds on which my opinion is still in accordance

* 939 * with that judgment as far as the decided cases are concerned.

In the judgment of the Court below, an opinion is expressed that in the statutes on copyright, the word "author" includes a foreign author resident abroad; but, with all respect for the argument presented by that judgment and the views there stated, I have been unable to arrive at the same conclusion. The statutes of this realm have no power, are of no force, beyond the domin-

¹ See *Brook v. Brook*, 9 H. L. Cas. 200.

² 4 Exch. 145.

³ 14 M. & W. 303.

ions of her Majesty, not even to bind the subjects of the realm, unless they are expressly mentioned, or can be necessarily implied, and I apprehend it becomes therefore a rule in construing a statute not to extend its provisions beyond the realm, whether to create a disability or to confer a privilege. An alien residing here owes a temporary allegiance to, and, while resident, is one of her Majesty's subjects; he owes obedience to the law, and is therefore entitled to the benefit of it, and I think he is an author within the meaning of the statute; but it appears to me that an alien resident abroad was not at all contemplated by the Legislature, and is not within any of the provisions of the Act. It seems conceded that if a foreign author first publishes his work abroad he cannot have a copyright in England; but why is this so, if such foreign author can be included within the enactments of the statute? The third section of the Act which confers copyright makes no distinction in words between a publication "in the lifetime of the author" in this country, and anywhere else. Again, the sixth section, which requires copies to be delivered to the British Museum, seems to confine the operation of the Act to the British dominions. From the whole tenor of this and all the other statutes, it seems to me that a foreign author resident abroad was altogether out of the contemplation of the Legislature in framing the *statutes which have created copyright, and *940 therefore Bellini, living at Milan, and not having published his work in any part of her Majesty's dominions, had no property to convey, no interest or right to assign.

This view of the subject necessarily leads to the answers I have given to your Lordships' second, third, fourth, fifth, and sixth questions. I think the varied circumstances suggested in those questions would not have made any difference, because I think the statute did not give to Bellini any right or interest which could be conveyed or assigned to Ricordi. But I think it respectful to your Lordships' questions to give some further answer to them. In answer to the second question, I think if Bellini had, with reference to the laws of this country, any right, interest, or property to assign, an assignment valid by the laws of Milan would have been sufficient, inasmuch as "copyright" is expressly enacted to be "personal property," and would therefore pass according to the laws of Milan, where the transfer took place. In answer to the third question, I think it very doubtful whether

copyright can be at all partially assigned. I am clearly of opinion that in this country the proprietor of the copyright could not assign it with reference to one country to one person, and with reference to another country to a different person, so as to give to each a right to maintain an action for infringing the copyright. Now, the statute in force at the time of this transfer was the 54th Geo. 3, c. 155. The fourth section of that Act makes copyright under the statute commensurate with the British dominions, and I think it is a right or property which is not capable of being divided into parts and divisions according to local boundaries. It appears to me, therefore, that the assignment to the defendant in

error being for publication in the United Kingdom only,
* 941 and not all the * British dominions, would operate as a

license only, and would not by the laws of the country enable the defendant to sue at law as the proprietor of the copyright for the United Kingdom only. It seems agreed on all hands that a publication at Milan before the assignment would have been fatal to any claim to copyright in this country ; and (if it existed) I am of opinion that a subsequent publication at Milan, but before publication here, would also have defeated it.

LORD CHIEF JUSTICE JERVIS. — My Lords, before I answer the question proposed by your Lordships, I wish to consider the record and the points which arise upon it, because it involves several technical considerations, some of which also appear upon your Lordships' questions, which might determine this writ of error, without pronouncing an opinion upon the main subject.

The party who excepts to the ruling of a learned Judge must show clearly, upon his bill, that the learned Judge was wrong. Every fair intendment must be made in favour of the summing up, and if, therefore, it is not apparent upon the record that the direction was wrong, the verdict must stand.

The first point of a technical nature which arises upon the bill of exceptions, and is also presented by your Lordships' last question, is, whether the certified copy of the Register Book, at Stationers' Hall, without more, entitled the plaintiff below to a verdict in his favour ? In my opinion it did not. The Statute 5 & 6 Vict. c. 45, § 11, only makes such certificate *prima facie* evidence of the proprietorship therein expressed, subject to be rebutted by other evidence, and, for the reasons which I shall give

hereafter, I think that such *prima facie* title is rebutted by the other evidence set out upon the record.

* The second point is likewise of a technical nature, and * 942 is involved also in the first and some other of your Lordships' questions. The bill of exceptions states that, by the law of Milan, Bellini was entitled to copyright in his book, and to assign the same, and that he did, by an instrument in writing, signed and executed by him according to the law of Milan, assign the said copyright to Ricordi. Construing this allegation by the rules applicable to bills of exceptions, there can be no doubt that the words "said copyright" refer to the copyright before mentioned, viz. the copyright to which Bellini was entitled by the law of Milan; and as by the law of Milan Bellini could have no copyright elsewhere, it follows that even if Bellini had, by the law of England, a copyright in England, it did not pass by this assignment to Ricordi. This point, in my judgment, is decisive of the writ of error; but, inasmuch as the parties have, not improbably, stated the assignment in this form by mistake, and your Lordships desire the opinion of the Judges upon other questions, I proceed to consider the principal subject.

Before doing so, however, there is another point, of a somewhat technical character, arising upon the bill of exceptions, and forming the subject of your Lordships' second question, which may here conveniently be disposed of. It does not appear upon the bill of exceptions that the assignment by Bellini to Ricordi, at Milan, was attested by two witnesses; on the contrary, as every fair intendment must be made against the party who excepts to the summing up, it must be taken after verdict that the assignment was not so attested. Upon this subject I have entertained some doubts, but upon consideration am of opinion that two witnesses were not necessary. I do not adopt the argument at the bar, that, being personal property, copyright would pass by a mode of transfer legal * in the country where the proprietor was * 943 domiciled, because, although that is the general rule with respect to personal property, it is subject to an exception where the personal property, as in this case English copyright, has a locality in a country which prescribes a particular form in which alone it can pass. My opinion is formed upon the difference which will be found in the wording of the Statutes 8 Anne, c. 19, and 54 Geo. 3, c. 156. If the case was governed by the statute of

Anne, I should think it clear that two witnesses were necessary, because an English copyright having a locality in England, and passing only in the form prescribed by the law of England, the cases cited at the bar, *Power v. Walker*,¹ *Davidson v. Bohn*,² would be expressly in point. But, in my opinion, the law has been altered in this respect by the Statute 54 Geo. 3, c. 156. This statute does not repeal the statute of Anne; it does not say that two witnesses shall not be necessary, but merely enacts that all booksellers and others who print and publish without the consent in writing of the proprietor, shall be liable to an action. A printer and publisher, therefore, who has the consent in writing of the proprietor, is not within this Act, or liable to an action. In this respect it is inconsistent with the statute of Anne, and, as I think, repeals it by implication. It is true that such provision does not expressly refer to an assignment of copyright, but neither does the statute of Anne, upon which reliance is placed. The cases referred to determined that as the statute of Anne required two witnesses for a simple license, an absolute transfer of the author's whole interest must be made with the same solemnity; and the same reasoning applied to the statute of Geo. 3, leads me to the conclusion that if a license in writing, unattested by witnesses, is sufficient to save a *printer and publisher from an action, an assignment of a copyright may be made in the same form.

*944 I come now to the main question, which is one of considerable difficulty and great importance: Has an alien resident abroad copyright in England? If he has, it must be by the common law or by statute, and upon each of these questions I will say a few words.

It will be convenient, however, before I do this, to understand clearly what is meant by the word "copyright," for much confusion has prevailed, during the argument at your Lordships' bar, from a misapplication of this term. Mr. Bovill contends that the owner of a book or a manuscript has the same right as the owner of a chair or other personal chattel; he may keep it exclusively for his own use; he may give it or lend it to another, with a stipulation that it shall not be copied; and he argues that because these rights may be enforced in this country by a foreigner resident abroad, a foreign author is therefore entitled to copyright. But

¹ 3 Maule & S. 7.

² 6 C. B. 456.

this meaning of the word "copyright," viz. the right to the individual copy, has no application to the subject under discussion. Copyright here means, the exclusive right of multiplying copies, which right does not attach to personal chattels; for although the owner of valuable inventions might at common law, and still may, under certain limitations, obtain the exclusive privilege of making them for public use, that right of monopoly springs from the prerogative of the Crown, and is not incident to the property itself.

It is not necessary to decide in this case whether a British author had copyright at common law. Upon this subject there has been much difference of opinion amongst the greatest authorities; and I find from the judgment of Lord Campbell, in the Court of Exchequer Chamber, that if it had been necessary, his Lordship, and the Judges * before whom that case was * 945 then argued, were strongly inclined to agree with Lord Mansfield, and the great majority of Judges, who in *Millar v. Taylor*, and *Donaldson v. Beckett*, declared themselves to be in favour of the common-law right of authors. It is with extreme diffidence, therefore, that I express an opinion upon the subject, and declare that, in my judgment, a British author has not copyright at common law. I see nothing to distinguish the case of the author, as owner, of a book or manuscript from that of the inventor or owner of a complicated and highly useful machine. Each is the result probably of great talents, profound study, much labour, and it may be, of great expense; but as the inventor of the steam engine would, at the common law, have had no exclusive privilege of multiplying copies of his machine for sale, I see no reason, from the peculiar nature of the property, why the author of a treatise to explain the action of the steam engine should have at the common law an exclusive right of multiplying copies of his work. Since the cases of *Millar v. Taylor*, and *Donaldson v. Beckett*, Lord Kenyon has expressed a decided opinion, that no such right existed, *Beckford v. Hood*.¹ Lord Ellenborough has inclined to the same view, *Cambridge University v. Bryer*;² and a majority of the American Judges, in *Wheaton v. Peters*,³ arrived at the same conclusion. But I agree with the Judges of the Exchequer Chamber, that it is not here necessary to decide that question;

¹ 7 T. R. 620.

² 8 Pet. 591.

³ 16 East, 317.

indeed, the plaintiff's title was not put during the argument upon the common-law right, except in so far as I have already referred to that argument; and it is clear that, even if by the common law a British author has copyright in this country, a foreign author resident abroad would not have it. The law of * 946 * Milan, where Bellini resides, would not confer it, and the common law of England would be confined to British authors, or to authors resident in England, and within the protection of the law of this country.

Is, then, the right conferred upon a foreigner, resident abroad, by the statute law of this country? In my opinion, it is not. The question turns upon the true construction of the Statute 8 Anne, c. 19, for the Statute 54 Geo. 3, c. 156, merely extends the term "copyright," without containing any provision applicable to this subject. In the construction of this statute we must not be influenced by questions of policy. Our duty is to expound the law to the best of our ability, and we must endeavour, if possible, to arrive at the intention of the legislators who passed the statute in the reign of Queen Anne. Statutes must be understood in general to apply to those only who owe obedience to the laws, and whose interests it is the duty of the Legislature to protect. Natural-born subjects, and persons domiciled or resident within the kingdom, owe obedience to the laws of the kingdom, and are within the benefits conferred by the Legislature; but no duty can be imposed upon aliens resident abroad, and with them the Legislature of this country has no concern, either to protect their interests or to control their rights.

But it is said that this Act itself shows that it was intended to apply to all authors, foreign or British, wheresoever resident. A careful consideration of this statute leads me to a different conclusion. It is an "Act for the Encouragement of Learning by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies." Authors are to be encouraged, by enabling them to obtain from their publishers a larger remuneration, because, their publishers having the exclusive right of multiplying copies, can obtain from the public a larger price * 947 * for each copy of the work. To this extent the public are injured, that the author may be rewarded. In the case of British authors, the avowed object of this Act, the encouragement of learning may be worth the price which the public pay for it,

and the Legislature may well be justified in such an enactment. But is it so with respect to foreign authors resident abroad? By the law of Milan, Bellini has that which, by the law of his own country, is deemed a sufficient encouragement for the advancement of learning. He has copyright in that country, and although it is true that an author would obtain more for his work if, by a simultaneous publication in every country in Europe, he could obtain a copyright in each country, such a state of things could not have entered into the contemplation of those who passed this Act. The object was the advancement of learning; and although I can understand why the privilege of copyright might have been given to foreign authors resident abroad, if their works, when once published abroad, could not have been imported into and published in this country, without their consent, I can see no reason why, having, what is deemed by their own country a sufficient encouragement for the publication of their works there, they should also be encouraged to publish in this country, for the mere purpose of giving them an additional reward at the expense of the reading public. I think, therefore, that the statute is confined to British authors; meaning, by that expression, natural-born subjects of the realm, and those who, by domicile, residence, or possibly by personal presence only, are under the dominion of and subject to the laws of England.

This latter consideration gives rise to an argument upon which much reliance was placed in the judgment of the Court below, where it was asked, why, if a foreigner may acquire the right by coming to England, may he not have *it whilst *948 resident abroad; and why need he come from Calais to Dover, and not send his manuscript to his publisher at once, without that trouble? The answer, in my opinion, is, that whilst he is out of the realm he is not subject nor entitled to the benefits of the laws of the kingdom. It may be that by taking upon himself a liability to obey the laws, even by a temporary presence in this country, he also acquires the rights which the same laws confer; but it by no means follows that he would have the same right whilst residing abroad, without taking upon himself the corresponding duty. It has been further urged that copyright is analogous to patent right, and that the same construction should be put upon the several statutes applicable to each. I have already explained that at common law monopolies spring from the pre-

rogative, and had no origin in the property protected. As guardian of the public interest, the Crown might legally, at common law, have granted monopolies for many purposes, and there is no doubt that it did so protect and foster the woollen manufacturers at Norwich, Ipswich, Wales, and elsewhere, who, though foreigners, introduced from a foreign country a new manufacture into this realm. Subsequently, when this prerogative, being abused, was controlled and defined by the Statute 21 James 1, c. 3, the works used were new manufactures within the realm, and true and first inventor of such manufacture, and the Courts, having reference to the common law, held that these words authorised the granting of a patent for an invention known abroad, but introduced as a new manufacture into this country. The distinction between the case of a patent and a copyright is this : In the former, at common law, the Crown might if it pleased grant a monopoly for a manufacture new in this country, but in full operation abroad ;

and the statute of James saved to the Crown the power of
*** 949 * granting monopolies for a limited period in respect of new**
 manufactures within the realm, meaning, of course, the same kind of manufactures as were the subject of monopolies at common law ; whereas there was certainly no copyright at common law for foreign authors, and the statute of Anne had nothing upon which it could attach to give to the words used a larger meaning than they naturally import.

It remains only for me to examine the cases which bear upon the subject, for if I had found a current of decisions one way, I should have deferred to them, and have felt myself bound by their authority. *Tonson v. Collins*¹ is the first case upon the subject. In that case Lord Thurlow, then at the bar, said, during the argument, that the right of property, copyright, if any, was personal, and might be acquired by aliens ; but the property pirated in that case was *The Spectator*, the composition of natural-born subjects resident in England, and the observation amounts only, at most, to an assertion by counsel, that if an author resident in England composes a work, it is immaterial whether he is an alien or a British subject. *Bach v. Longman*² is the next case in order of time, and this is said to be an authority, because Baron Wood, then at the bar, did not object that the plaintiff was a foreigner. The only matter to be there determined was, whether a musical composition

¹ 1 W. Bl. 301 – 321.

² Cowp. 623.

was a book within the statute, and the point, therefore, could not arise, even if it had been clear that Bach was a foreigner, or if a foreigner, was not resident in this country when he published his work. *D'Almaïne v. Boosey*¹ was decided by Lord Abinger, avowedly under the authority of *Bach v. Longman*, which, for the moment, was supposed to have determined that a foreigner resident * abroad had copyright in this country ; but that * 950 case, when examined, establishes no such thing, and the authority upon which it proceeded failing, the case of *D'Almaïne v. Boosey* cannot now be considered as conclusive upon the subject. In the two cases referred to before Vice-Chancellor Shadwell, he seems to have been of opinion both ways. In *Delondre v. Shaw*,² he is reported to have said that the Court would not protect the copyright of foreigners, and in *Bentley v. Forster*³ he directed an action to try the right. *Clementi v. Walker*,⁴ so far as it goes, is an authority for the plaintiff in error. The point decided there was, that a prior publication in France destroyed any copyright which a foreigner, coming to this country, might have here ; but the Court intimated an opinion that the statute of Anne was passed for the advancement of British learning.

Such was the state of the authorities when this great question was for the first time pointedly raised in the case of *Chappell v. Purday*.⁵ The Court of Exchequer in that case held, under circumstances like the present, that a foreigner resident abroad had no copyright, for that the statute of Anne was confined to British authors. The Court of Common Pleas, in *Cocks v. Purday*,⁶ took a different view of the same subject ; and in *Boosey v. Davidson*,⁷ the Court of Queen's Bench followed the case of *Cocks v. Purday* without making any observations upon the subject. It was supposed at the time when *Boosey v. Davidson* was decided, that there had been a difference of opinion amongst the learned Judges who heard it, and that the Court had for that reason followed the last case without comment, leaving the question to be determined by a * Court of Error. But I find by Lord Campbell's judgment that such was not the case ; he was in-

¹ 1 Younge & C. Exch. 288.

⁴ 14 M. & W. 303.

² 2 Simons, 237.

⁵ 5 C. B. 860.

³ 10 Simons, 329.

⁶ 13 Q. B. 257.

⁴ 2 B. & C. 861.

formed by his colleagues that the decision in *Cocks v. Purday* was not only followed, but was fully considered and entirely approved of by Lord Denman and all his brethren. That case must therefore be treated as a deliberate and well-considered decision upon the subject. In the last case, *Boosey v. Purday*, the Judges of the Exchequer adhered to their former judgment. In truth, therefore, there are but four cases which bear directly upon the subject ; one in the Common Pleas, and one in the Queen's Bench, in favour of the defendant in error, and two in the Exchequer, in favour of the plaintiff in error. The learned Judge who tried this cause adopted the view of the Court of Exchequer, and it cannot be said, in this state of the authorities, that he was bound by express decisions to take a different view.

With this preface, I proceed to answer your Lordships' questions.

I answer the first question in the negative, because the question assumes that Bellini only assigned to Ricordi the copyright which Bellini had by the law of Milan ; and further, because Bellini had, under the circumstances stated, no copyright in England which he could assign.

I answer the second question in the negative, because, first, in my opinion, two witnesses would not be required to attest the assignment of an English copyright, if Bellini had such a copyright to assign ; secondly, because Bellini did not profess to assign the English copyright if he had it ; and thirdly, because he had, in my opinion, no English copyright to assign.

I answer the third question in the negative, because, for the reasons which I have given, I am of opinion that Bellini had no English copyright which he could assign.

* 952 * I answer the fourth and fifth questions in the negative, because Bellini, under the circumstance, having no English copyright to assign, it is immaterial whether the work was published abroad before or after the assignment, and before the publication in this country. In *Clementi v. Walker*¹ it was decided that a prior publication abroad would prevent a foreign author resident in this country from having copyright here.

I answer the sixth question in the negative, under the particular circumstances of this case, because, in my opinion, Bellini had no English copyright to assign.

¹ 2 B. & C. 861.

I answer the last question in the affirmative, because technically the assignment to Ricordi passed only the Milanese copyright, and because substantially Bellini had no English copyright to assign.

August 1.

THE LORD CHANCELLOR having stated very fully the nature of the action, and the evidence set forth in the bill of exceptions, said : —

These being the facts deposed to, the question arose, whether they afforded evidence of the existence of any copyright in the defendant in error? It may be assumed, that on the facts thus proved, the rights of Bellini, the author (if any), had been effectually transferred to Boosey, the defendant in error; and thus the important question arose, whether Bellini had by our law a copyright which he could transfer through Ricordi to Boosey, so as to entitle the latter to the protection of our laws?

If the work, instead of having been composed by an alien resident abroad, had been composed by a British subject resident in England, there is no doubt but that his assignee would have acquired a copyright which our laws would * protect. *953 The question, therefore, arising on this evidence (assuming the assignments, first to Ricordi, and then to Boosey, to have been effectually made), is whether Bellini ever had a copyright here? that is, whether an alien resident abroad, and there composing a literary work, is an author within the meaning of our copyright statutes? If he is not, then the direction which I gave at the trial was correct; for then it was proper to tell the jury that the evidence would not warrant a finding that Boosey was the proprietor of the alleged copyright, or that there was, in fact, in this country any subsisting copyright in the said work.

The case was argued most ably at your Lordships' bar in the presence of the learned Judges, ten of whom have since given us their opinions on the questions submitted to them. They have differed in the conclusions at which they have arrived; six of them being of opinion that Bellini had a copyright which was effectually transferred to the defendant in error, and four of them holding, on the other hand, that he had no such right. The majority, therefore, is of opinion that my direction at the trial was wrong, and so, that the Exchequer Chamber was right in awarding a *Venire de novo*.

It is impossible, my Lords, to overrate the advantage which we have derived from the assistance of the learned Judges in helping us to come to a satisfactory decision on this important and difficult question. They have in truth exhausted the subject, and your Lordships have little else to do than to decide between the conflicting views presented to you by their most able opinions. I could have wished that, as my direction at the trial was the matter under review, I might escape from the duty of pronouncing an opinion in this case; but I have felt that I have no right to * 954 shrink from responsibility, and I have therefore given * the case my most anxious attention; and I now proceed to state, very shortly, why it is that I adhere to the opinion I expressed at the trial, and why I therefore think that the Court of Error was wrong in awarding a *Venire de novo.*

In the first place, then, it is proper to bear in mind that the right now in question, namely, the copyright claimed by the defendant in error, is not the right to publish, or to abstain from publishing a work not yet published at all, but the exclusive right of multiplying copies of a work already published, and first published by the defendant in error here in this country. Copyright thus defined, if not the creature, as I believe it to be, of our statute law, is now entirely regulated by it, and therefore in determining its limits we must look exclusively to the statutes on which it depends. The only statutes applicable to the present case are the Statutes of 8 Anne, c. 19, and the 54th of Geo. 3, c. 156. Indeed, the first of these statutes is that to which alone we may confine our attention; for though the statute of George the Third extends the term of protection, it does not alter the nature of the right, or enlarge the class of persons protected. Looking, then, to the statute of Anne, we see by the preamble that its object was the "encouragement of learned men to compose and write useful books"; and even if there had been no such preamble, the nature of the enactments would have sufficiently indicated their motive. With a view to attain this object, the statute enacts, that "The author of any book which shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book for the term of fourteen years, to commence from the day of the first publishing the same, and no longer." The substantial question is, Whether, under the term "author," we are to understand the Legislature as referring to British

authors only, or to have contemplated all authors of every * nation. My opinion is, that the statute must be con- * 955 strued as referring to British authors only. *Prima facie* the Legislature of this country must be taken to make laws for its own subjects exclusively, and where, as in the statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of her Majesty's subjects, the object of giving that privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community, for the general advantage of which the enactment is made. When I say that the Legislature must *prima facie* be taken to legislate only for its own subjects, I must be taken to include under the word "subjects" all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute; he is within its words and spirit. I go further; I think that if a foreigner, having composed, but not having published a work abroad, were to come to this country, and, the week or day after his arrival, were to print and publish it here, he would be within the protection of the statute. This would be so if he had composed the work after his arrival in this country, and I do not think any question can be raised as to when and where he composed it. So long as a literary work remains unpublished at all, it has no existence, except in the mind of its author, or in the papers in which he, for his own convenience, may have embodied it. Copyright, defined to mean the exclusive right of multiplying copies, commences at the instant of publication; and if the author is at that time in England, and while here he first prints and publishes his work, he is, I apprehend, an author, within the meaning of the statute; even though he should have come here solely with a view to the * publication. The law * 956 does not require or permit any investigation on a subject which would obviously, for the most part, baffle all inquiry; namely, how far the actual composition of the work itself had, in the mind of its author, taken place here or abroad. If he comes here with his ideas already reduced into form in his own mind, still, if he first publishes, after his arrival in the country, he must be treated as an author in this country. If publication, which is (so to say) the overt act establishing authorship, takes place here,

the author is then a British author, wherever he may, in fact, have composed his work. But if at the time when copyright commences by publication, the foreign author is not in this country, he is not, in my opinion, a person whose interests the statute meant to protect.

I do not forget the argument, that from this view of the law the apparent absurdity results, that a foreigner having composed a work at Calais, gains a British copyright if he crosses to Dover, and there first publishes it, whereas he would have no copyright if he should send it to an agent to publish for him. I own that this does not appear to me to involve any absurdity. It is only one among the thousand instances that happen, not only in law, but in all the daily occurrences of life, showing that whenever it is necessary to draw a line, cases bordering closely on either side of it are so near to each other, that it is difficult to imagine them as belonging to separate classes ; and yet our reason tells us they are as completely distinct as if they were immeasurably removed from each other. The second which precedes midday is as completely distinct from that which follows, as the events which happened a hundred years ago are from those which are to occur in the next century. I do not, therefore, feel the force of the argument to which I have just adverted.

*957 * On the other hand, great support for the opinion of those who think that the statute did not comprise foreign authors may be found in the exception, which those who take a different view are obliged to make, of the case of authors who have just published abroad. I do not see any satisfactory ground for such an exception, if we are to consider the statute as extending to foreigners at all. If the object of the enactment was to give, at the expense of British subjects, a premium to those who laboured, no matter where, in the cause of literature, I see no adequate reason for the exception, which it is admitted on all hands we must introduce, against those who not only compose, but first publish, abroad. If we are to read the statute as meaning by the word "author" to include "foreign authors living and composing abroad," why are we not to put a similar extended construction on the words "first published"? And yet no one contends for such an extended use of these latter words.

Some stress was laid on the supposed analogy between copyright and the right of a patentee for a new invention ; but the distinc-

tion is obvious. The Crown, at common law, had, or assumed to have, a right of granting to any one, whether native or foreigner, a monopoly for any particular manufacture. This was claimed as a branch of the royal prerogative, and all which the Statute of 21 Jac. 1, c. 3, § 6, did was to confine its exercise within certain prescribed limits ; but it left the persons to whom it might extend untouched. The analogy, if pursued to its full extent, would tend to show that first publication abroad ought not to interfere with an author's right in this country. For certainly it is no objection to a patent that the subject of it has been in public use in a foreign country. I am aware that the statute of James, in reserving to the Crown the power of granting to inventors the exclusive right of * making new manufactures for fourteen years, has the * 958 words "within this realm" ; but these same words are implied, though not expressed, in the statute of Anne, and I cannot, therefore, feel any force in the argument derived from this statute.

My opinion is founded on the general doctrine, that a British statute must *prima facie* be understood to legislate for British subjects only, and that there are no special circumstances in the statute of Anne, relating to authors, leading to the notion that a more extended range was meant to be given to its enactments.

It remains, however, to look to the authorities ; for certainly if I had found any long uniform current of decisions in favour of the view taken by the Court of Error, I should readily yield to them, whatever might be my opinion of their original soundness ; but I find nothing of the sort. Indeed, I agree with the observation of Mr. Baron Alderson, that it is wonderful how little in the nature of authority we have to guide us.

The earliest case to which we are referred was *Tonson v. Collins* ;¹ but this was hardly relied on seriously ; it proves no more than this, that Lord Thurlow, when at the bar, in arguing a case of copyright, treated natural-born subjects and aliens as standing on the same footing, when it might, perhaps, have been to the interest of his client that he should have argued differently. This must, I think, be wholly disregarded.

We may also disregard the various cases in which questions have arisen as to the rights of a foreigner resident in this country and first publishing his work here ; they have no bearing on the

¹ 1 W. Bl. 301, 321.

point now under discussion, as the right of such persons is not disputed. *Bach v. Longman*,¹ in Lord Mansfield's time, may be * 959 placed in this class. In * truth, until very recently, there have been no cases bearing directly on the point.

In *Delondre v. Shaw*,² before the late Vice-Chancellor of England, we find that learned Judge stating, extra-judicially, that the Court of Chancery does not interfere to protect the copyright of a foreigner. That dictum was uttered in 1828; and, four years later, the same learned Judge held, in *Page v. Townsend*,³ what indeed could hardly have been doubted, that engravings designed and sketched abroad, though imported and first published here, were not entitled to the protection of our statutes.

The next case was that of *D'Almaine v. Boosey*,⁴ in 1835, in which Lord Abinger disputed the correctness of what had been said *obiter* by Vice-Chancellor Shadwell, in *Delondre v. Shaw*, and granted an injunction in favour of a foreign composer, or, rather, the assignee of his right.

In 1839 the point again came before the Vice-Chancellor Shadwell, in *Bentley v. Foster*,⁵ when he expressed his opinion to be in favour of the foreigner's copyright, but he would not decide the point without a previous trial at law.

Then occurred, two years latter, the case of *Chappell v. Purday*,⁶ before Lord Abinger, sitting in Equity; when, though he adhered to the opinion he had expressed in favour of the foreigner's right, yet he declined to act in the particular case, on account of special circumstances.

Since Lord Abinger's time, the question has been brought before all the Courts of common law, and their judgments have been conflicting. The Court of Queen's Bench, in the case * 960 of *Boosey v. Davidson*,⁷ and the Court of Common * Pleas, in that of *Cocks v. Purday*,⁸ have decided in favour of the foreigner's right. On the other hand, the Court of Exchequer, in *Chappell v. Purday*,⁹ and afterwards in *Boosey v. Purday*,¹⁰ took a different view of the law, and held that the statutes do not extend to foreigners. I do not go into the particular facts of those

¹ Cowp. 623.

⁴ 4 Younge & C. Exch. 485.

² 2 Simons 237, 240.

⁷ 13 Q. B. 257.

³ 5 Simons, 395.

⁸ 5 C. B. 860.

¹ 1 Younge & C. Exch. 288.

⁹ 14 M. & W. 303.

⁵ 10 Simons, 330.

¹⁰ 4 Exch. 145.

cases; they are fully commented on in the very able opinions of the Judges. I consider it quite sufficient to say that these cases seem to me only to show that the minds of the ablest men differ on the subject. There is nearly an equal array of authorities, all very modern, on the one side and on the other. It can only be for this House to cut the knot.

I have already stated, shortly, my grounds for concurring with the four Judges who are in the minority. Being thus of opinion that no English copyright ever existed in this work, I have not thought it necessary to go into the minor and subordinate inquiries on which it might have been necessary to come to a conclusion, if my view on the greater question had been different; and I now, therefore, merely move your Lordships that the judgment below be reversed, and that judgment be given for the plaintiff in error.

LORD BROUGHAM.—My Lords, I must begin by stating how entirely I agree in what my noble and learned friend has observed as to the great ability and learning with which this case was argued at the bar on both sides, and the great assistance which we have derived from the answers which have been given to our questions by the learned Judges.

* In coming to a decision on this case, it is not necessary * 961 to assume that the much-vexed question of common-law right to literary property has been disposed of either way. Yet as a strong inclination of opinion has been manifested upon it, as that leaning seems to pervade and influence some of the reasons of the learned Judges, and as the determination of it throws a useful light upon the subject now before us, I am unwilling to shrink from expressing my own opinion on the question, the more especially as I am aware that it does not coincide with the impressions which generally prevail, at least, out of the profession.

The difference of opinion among the learned Judges on the various points of the present case are not greater than existed when *Donaldson v. Beckett*¹ was decided here in 1774, and when, in 1769, in the case of *Millar v. Taylor*,² the Judges of the Court of King's Bench had been divided in opinion for the first time since Lord Mansfield presided in that Court. In this House they were, if we reckon Lord Mansfield, equally divided upon the main ques-

¹ 4 Burr. 2408, 2 Brown, P. C. 129.

² 4 Burr. 2303.

tion, whether or not the action at common law is taken away by the statute, supposing it to have been competent before ; and they were divided, as 9 (or with Lord Mansfield 10) to 3, and as 8 to 4, upon the two questions touching the previously existing common-law right. This House, however, reversed the decree under appeal, in accordance with the opinion given on the main point by the majority of the Judges; and upon the general question of literary property at common law no judgment whatever was pronounced.

In this diversity of opinion, it asks no great hardihood to maintain a doctrine opposed to that of the majority of those high authorities, considering the great names which are to be

* 962 found on either side ; but it must be admitted * that they

who, both on that memorable occasion and more recently, have supported the common-law right, appear to rely upon somewhat speculative, perhaps enthusiastic, views, and to be led away from strict, and especially from legal, reasoning into rather declamatory courses. Some reference also seems to have been occasionally made to views of expediency or of public policy, to the conduct of foreign states, and the possible effects produced upon it by a regard to the arrangements of our municipal law. All such considerations must be entirely discarded, even as topics, from the present discussion, which is one purely judicial, and to be conducted without the least regard to any but strictly legal arguments.

The right of the author before publication we may take to be unquestioned, and we may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript ; he may withhold, or he may communicate it, and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation. But if he makes his composition public, can he retain the exclusive right which he had before ? Is he entitled to prevent all from using his manuscript by multiplying copies, and to confine this use of it to those whom he specially allows so to do ? Has he such a property in his composition as extends universally and enures perpetually, the property continuing in him wheresoever and whenever that composition may be found to exist ? In other words,

can his thoughts, or the results of his mental labour, or the produce of his genius, be considered as something fixed and defined, which belongs to him exclusively at all times and in all places ?

* First, let us observe that this question cannot be confined to the form, whether written or printed, which that composition takes, or in which these thoughts are conveyed. If it is clear that before publication the author has the right, and may proceed against those to whom he imparts his manuscript under conditions, it is equally clear that if he had communicated his composition to them verbally under such conditions, he could have complained of a breach. The question is personal between him and them. But if instead of orally delivering his composition to a select number, he delivered it to all who came and heard him, imposing no restriction, he could not complain with effect of any one repeating it to others who had not been present. Now, there seems no possibility of holding that he can prevent the persons to whom he gave or sold his paper, whether written or printed, from making their own use of it, without also holding that he could proceed against his auditors unwarned. If each of these might repeat what he had heard, each of those might lend the paper or book, and could only be tied up from so doing by express stipulation, imposing restrictions upon him when he received it. So, if he could lend it, he could copy it and give or sell his copy unless so tied up. It is another thing to maintain that no such restriction could be imposed, *per expressum*. If each copy, furnished by the author, bears with it a stipulation on his part, a correlative obligation may rest on the receiver, restraining him from any but the restricted use of the composition. But the doctrine of copyright, after publication, assumes that there exists by force of law an implied notice to all the world against using the book or paper, except in one way, namely, reading it.

Again, this right, if it is of a proprietary nature, is not only in the author, but it is transferable by assignment, * and he may prevent all using the copies he has sold without leave of his assigns ; that is, he may vest in his assigns *964 the power of preventing any one, without their leave, from reading the composition. By parity of reasoning, if he recites it, he may forbid any hearer to repeat it, without leave of some one authorised by him, although no condition had been imposed upon those

who entered the place of recitation to listen; and if any such auditor, unknown to the author, or his licensee, has repeated it, the author or his licensee, or assignee, may proceed against the party to whom that rehearsal has been made, in case he repeats without leave what he has been told by the first hearer. This consequence, if not wholly absurd, yet assuredly somewhat startling, follows from the title alleged.

Furthermore, the author's right of exclusion is not confined to his own life, if it is, or if even it resembles, a right connected with property. It must be descendible and devisable as well as assignable. If Milton's deathless verse had been recited, or Newton's immortal discoveries had been revealed in some learned conference, the right to let others hear them would have been confined to licensed persons, not indeed during the existence of the globe, which those prodigious works enlightened, and were fated to endure while it lasted, but as long as the Statute of Limitations and the law of perpetuities allowed.

It is not to be supposed that the analogy of incorporeal hereditaments affords countenance to the doctrine. These are connected with, or rather they are parcel of, corporeal rights; they rest upon a substantial, a physical basis; rather they are the uses of something material. A rent is something issuing out of land; a way, the use of the land's surface. The enjoyment of the rent or of the way is only an incident, a fruit, or consequence of the

possession. The composition, and the repetition or copying
*965 of it, *cannot be so distinguished and kept apart. There

is nothing in the thought of the person resembling the substance to which the incorporeal hereditament is related. They are of too unsubstantial, too evanescent a nature, their expression of language in whatever manner is too fleeting, to be the subject of proprietary rights. *Volat irrevocable verbum*, whether borne on the wings of the wind or the press, and the supposed owner instantly loses all control over them. When the period is demanded at which the property vests, we are generally referred to the moment of publication. But that is the moment when the hold of the proprietor ceases. He has produced the thought and given it utterance, and, *eo instanti*, it escapes his grasp.

Thus, whatever may have been the original right of the author, the publication appears to be of necessity an abandonment; as long as he kept the composition to himself, or to a select few

placed under conditions, he was like the owner of a private road ; none but himself or those he permitted could use it ; but when he made the work public, he resembled that owner after he had abandoned it, who could not directly prohibit passengers, or exact from them a consideration for the use of it.

It seems a further argument against the right, that property in one person essentially implies absolute exclusion of all others. A property which by possibility, however remote, may belong just as entirely to one as to another, stands, it must be admitted, in a most anomalous position. The case has sometimes been put of two persons falling upon the very same words. In a translation this is not so improbable ; and we must remember both that translation falls within the rule as well as original composition, and also that any writing, however short, stands in the same position with the longest. Now it is very possible indeed *that two *966 persons should translate a few lines in the selfsame words. Here there is an instance where the selfsame thing would belong exclusively to each, which is absurd.

Some have relied on the case of inventions, but, as appears to me, without due reflection, when used upon that side of the argument ; for this reference seems an exceedingly strong argument against the supposed right, and an argument from which its advocates cannot escape, as some of them have attempted, by urging that the two cases stand on different grounds. I hold that they stand in one material respect on the same ground. Whatever can be urged for property in a composition must be applicable to property in an invention or discovery. It is the subject matter of the composition, not the mere writing, the mere collection of words, that constitutes the work. It may describe an invention, as well as contain a narrative or a poem, and the right to the exclusive property in the invention, the title to prevent any one from describing it to others, or using it himself (before it is reduced to writing) without the inventor's leave, is precisely the same with the right of the author to exclude all men from the multiplication of his work. But in what manner has this ever been done or attempted to be done by inventors ? Never by asserting a property at common law in the inventor, but by obtaining a grant from the Crown. The King had illegally assumed the right of granting such monopolies in many things, until the abuse was corrected by the 21 James 1, c. 3, which, as Lord Coke says

(3 Institutes, 181), is a judgment in Parliament, that such grants were against the ancient and fundamental laws, and he considers them (2 Institutes, 47 – 63) to be against Magna Charta. The statute, however, by its well-known proviso, section 6, allowed

* 967 such exclusive privileges to be granted for a limited * time to inventors, and it is only under the Crown grants permitted by this proviso that they have ever had the privilege. Monopolies had been given to authors and publishers of books while the abuse continued, both in the reign of Elizabeth, and of her immediate predecessors ; but no saving clause for these was introduced in the statute of James. On the contrary, the 10th section provides that these as well as some other grants shall not be affected either by the prohibition or by the proviso.

It is said that literary and scientific men are left without protection, and that the invaluable produce of their labours is unduly estimated by the common law, if the right in question be not recognised. But the negation of that right only implies that we refuse to acknowledge a property in things by their nature incapable of being held in severalty, and that we recoil from adopting a position which involves contradiction. The contradiction is, that one can retain that which he parts with, and can dedicate to the public, or at least do an act which necessarily involves such dedication, and yet keep exclusive possession of the thing dedicated, and retain all the rights he had before the dedication.

But although the inability to hold these contradictory positions precludes, to a great degree, the common-law encouragement of letters and science, their cultivators are not without resource ; for while the nature of the thing and the incidents of its production prevent it from being the subject of property at common law, the lawgiver can make it a *quasi* property, or give the author the same kind of right and the same remedies which he would have if the produce of his labour could have been regarded as property, and so it is in other cases. A remarkable instance at once presents

itself where the interposition of the positive law is as much
* 968 to be lamented and condemned * as in the case of letters and science it is to be gratefully extolled. By all rules, by the nature of the subject, by the principles of morality, by the sanction of religion, there can be no property in human beings ; the common law rejects, condemns, and abhors it. But such a power has been established by human laws, if we may so call those

acts of legislative violence which outrage humanity, and usurp, while they profane, the sacred name of law. That which was before incapable of being dealt with as property by the common law, became clothed by the lawgiver's acts with the qualities of property ; and thus the same authority of the lawgiver, but exercised righteously and wisely for a legitimate and beneficent purpose, gave to the produce of literary labour that protection which the common law refused it, ignorant of its existence ; and this protection is, therefore, in my opinion, the mere creature of legislative enactment.

That the weight of authority is in favour of this position I hold to be clear. The very able argument of Mr. Justice Yates, in *Millar v. Taylor*,¹ may fairly be set against that of the two Judges, Mr. Justice Willes and Mr. Justice Aston, who agreed in the opposite opinion ; and I entirely concur with the objection taken by the Lord Chief Baron in the present case to the argument of Mr. Justice Willes. Lord Mansfield gives, no doubt, an unhesitating opinion, with the grounds of it ; but he rather relies on the argument of the two Puisne Judges, who differed from Mr. Justice Yates, than enters very fully into the discussion himself.

In 1798 we have a very decided opinion, to this effect, of Lord Kenyon in *Beckford v. Hood*,² who also says that the doctrine " finally prevailed " against that maintained by some of the Judges in *Donaldson v. Beckett*, that * authors and their assigns had a right independent of statute. Mr. Justice Ashurst, who had been one of those Judges, does not in that case (*Beckford v. Hood*) reaffirm his former opinion.

In a case which I argued in 1812, in the Court of King's Bench, Lord Ellenborough's opinion leant to the same side, although he did not consider it necessary to express it decidedly, the case not requiring it. I refer to the case of the *Cambridge University v. Bryer*.³

But I also consider the statute of Anne itself as plainly indicating the opinion of the Legislature that there was no copyright at common law. This appears throughout its whole provisions, and manifestly from this, that its purpose being as stated in the preamble " to encourage learned men to compose and write useful books," it vests in the authors and their assignees the exclusive

¹ 4 Burr. 2854.

² 16 East, 317.

³ 7 T. R. 620.

right of printing for twenty-one years, and no longer, from the 10th of the following April, in certain cases, and in others fourteen years from the date of the publication. Surely if authors and their assigns had possessed the unrestricted right at common law, this restraint upon it could hardly have been deemed an encouragement, even coupled with the not very ample or stringent statutory remedies provided.

It being, therefore, in my judgment, unquestionable that the statutes alone confer the exclusive right, can it be contended that the Legislature had in contemplation to vest the right in any but its subjects, and those claiming through them? These statutes, or rather the Statute of 8 Anne, c. 19 (for the 54 Geo. 3, c. 156, does not alter it, except by extending the period of the monopoly) in no way affects the class of persons to enjoy it, as my noble and learned friend has justly observed. We are,

* 970 * therefore, required to rely solely upon the statute. The

encouragement of learning, by encouraging learned men to write useful books, is declared to be the object of the statute, and that object it pursues by giving the author and his assigns a monopoly for a limited period. The Legislature gives this encouragement at the expense of its own subjects, to whom the monopoly raises the price of books. Generally, we must assume that the Legislature confines its enactments to its own subjects, over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases, and may, without express words, make it appear that such is the intendment of those provisions. But the presumption is rather against the extension, and the proof of it is rather upon those who would maintain such to be the meaning of the enactments.

It can hardly be contended that, a century and a half ago, the Parliament was minded to encourage learning at home, by encouraging foreigners to write books at the expense of the British purchaser; that a monopoly in our market was to be established for the sake of foreign writers, who might thus be induced to write, and thereby benefit our people. We cannot say that foreign authors were wholly out of the contemplation of the Act, that their case was *casus omissus*. There is express provision made for the importation of books in Greek, Latin, or any foreign language, notwithstanding the prohibitory enactments. It was therefore

assumed that foreigners would publish abroad, and that their works might be brought over. That the price of all works in the British market was a subject of care to the framers of the Act is manifest, because provision is made for preventing an undue price of books by the power given in the 4th section to * certain authorities to fix their price; which absurd provision, as is well known, was repealed thirty years afterwards, by 12 Geo. 2, c. 36. This provision was taken from an Act of the 25 Henry 8, c. 15, § 4, repealing the permission given by 1 Richard 3, c. 9, § 12, to import printed books, and repealing it in order to protect the printers and binders, who had, during the half century that intervened since the Act of Richard 3 become a considerable craft. While giving native industry this protection, it pleased the Legislature to impose the restriction upon the price of books by conferring upon certain high functionaries the power of fixing it. And two centuries and more had not found the Legislature more rational, for the statute of Anne adopted a similar provision. But absurd as we all must now admit that provision to have been, it at least showed the strong disposition of the Legislature, not only in Henry the Eighth's time, but in Queen Anne's time, to protect the British purchasers against high prices. Yet the contention that learning and learned men are to be encouraged by giving foreign authors a monopoly at the expense of British purchasers, proceeds upon the assumption that there was no care for their interests. And if it be said that the consideration of cheapness was to be sacrificed to the wish for the encouraging of foreign writers, whereby the British purchaser might gain more than he lost in the price, the answer is, that the very same consideration would have prevented the attempt at keeping down the price of books published under the Act, because their authors, being thus encouraged to write, the purchaser gained, in so far, though he lost in the cheapness of the books. But in truth no one can read the provision touching prices without drawing a further inference from it, that very crude and narrow principles then prevailed on these subjects; and we could hardly expect that the same Legislature * which appointed an authority with stringent liberal powers to keep down prices would entertain such large and enlightened views as it must have had, if it encouraged foreigners, at the temporary and immediate cost, at all events, of its own subjects, for

the sake of multiplying generally the number of useful works, and so benefiting those subjects on the whole.

Among a good deal of somewhat popular and declamatory matter, which is to be found in this case, may be mentioned that more plausible and more showy than solid objection taken, that the consequence of confining the statute to one territory will be to make a foreign author come over to Dover, in order to have the exclusive privilege; whereas, as has been adverted to by my noble and learned friend, if he stopped at Calais he could not have it. This is only one of the consequences, as my noble and learned friend justly observed, of any law which is bounded in its operation by extent of territory. We have abundant instances of such results, not only in civil but in criminal law, and sometimes in both civil and criminal law together, arising out of some diversity of jurisdiction. Married one foot on this side of the middle of a bridge between England and Scotland, the parties have been held by all the Judges guilty of felony, and their issue bastard; when had the nuptial contract been made a foot to the north, the marriage would have been lawful, and its issue legitimate. The English female owner of an estate or settlement, if she comes to Dover, and there lies in, produces issue inheritable, being English issue; if she had been taken in labour at Calais, the issue would have been alien, and could not have taken the estate. So of the consequences arising from limitations in point of time, which have been well adverted to by my noble and learned friend.

The authority of the decided cases which bear upon the
* 973 * question before us is of less moment than it otherwise

would be, inasmuch as there is a conflict of decisions; and we may regard the whole of them to be now brought under our review for the ultimate settlement of the question by this House, which is not bound by the resolutions of the Courts below. So great respect, however, is due to those Courts, that it is fit that we should note what has passed there, before arriving at our final determination.

First of all, we may lay out of view whatever has been said, either at the bar, or on the bench, respecting the case of *Tonson v. Collins*,¹ and the case of *Bach v. Longman*.² The former amounts really to nothing; it resolves itself into the fact of the counsel, Mr. Thurlow, who argued it, having observed that the right, if

¹ 1 W. Bl. 801.

² Cowp. 623.

any, might be acquired by aliens ; the special verdict having found that the work in question was one written by a natural-born subject resident in England. But even if this had been a dictum of the Judge, instead of a remark by counsel, it would prove nothing, for it is not denied in the case at bar, that an alien resident in England may have the right, under the statute. The other case, *Bach v. Longman*, is exposed to the same objection ; it is only the admission or implied admission of Mr. Wood (afterwards Baron Wood), who conducted the cause.

But along with these two cases we have likewise to strike out of the authorities in this case that of *D'Almaine v. Boosey*, in the Exchequer,¹ in which Lord Abinger granted an injunction, upon the authority of *Bach v. Longman*, inadvertently supposing that the admission had been made by the Court, when it had only been an implied admission, rather than a direct admission by Mr. Wood, the counsel.

* The cases before Vice-Chancellor Shadwell are likewise *974 to be disregarded. The dictum in *Delondre v. Shaw*,² that the Court did not protect copyright of a foreigner, is in favour of the opinion I have formed. But in *Bentley v. Foster*,³ the same learned Judge, taking a different view, referred the parties to an action in which the right might be tried. The authority of the same learned Judge in a third case, *Page v. Townsend*,⁴ would have been in favour of the position now maintained, but that he relied on express words, confining the protection of one Act to English works, being, by implication, to be considered as imported into other Acts *in pari materia* ; a circumstance which of course does not occur here.

We are thus left to the cases in direct conflict, except that of *Clementi v. Walker*,⁵ and that, as far as it goes, supports the doctrine for which I contend, because the learned Mr. Justice Bayley, who delivered the judgment of the Court, lays it down as clear that the statute of Anne was made with a view to British interests and the advancement of British learning (page 868), and that without "very clear words, showing an intention to extend the privilege to foreign works, it must be confined to books printed in this kingdom," which is the course of argument used by those who argue here with the plaintiff in error.

¹ 1 Younge & C. Exch. 288. ² 10 Simons, 329.

³ 2 Simons, 240.

⁴ 5 Simons, 395.

⁵ 2 B. & C. 861.

Of the cases in conflict, *Chappell v. Purday*¹ and *Boosey v. Purday*,² both in the Exchequer, on one side, *Cocks v. Purday*³ in the Common Pleas, and *Boosey v. Davidson*⁴ in the King's Bench, on the other side, it is needless that I should discuss the merits, or compare

*975 * the weight, as authorities; because they may be said now to be before us, as along with the judgment of the Exchequer Chamber, in the case at bar. I may, however, remark

that the decision in the Common Pleas appears to have been made, not so much upon the consideration of the statutes applicable to the question, as upon the erroneous assumption that the Court of Exchequer had in *Chappell v. Purday* questioned the personal right of an alien in England. I think traces of this erroneous view may be discerned in the able answers to your Lordships' questions, given by the only Judge of that Court of Common Pleas who has been present at this argument, viz. Mr. Justice Maule, and who had joined in the Common Pleas decision.

It remains for me to note the point made on the Milanese copyright; that is, copyright by the Austrian or Lombardo-Venetian law. I hold it clear that this could confer no copyright beyond the territory; consequently, that the assignee of the great composer, with whatever solemnities he derived his title, could take nothing which benefited him in this action, for that great master at Milan had no right in England to assign.

But if it be said (and the somewhat subtle argument is to be found both in the contention at the bar, and in the answers of some of the Judges) that copyright being recognised by the *lex loci*, and recognised as a right at common law, the party or his assignee can avail himself of this right in England, as it were in derogation of, and in exception to, our common law repudiating such right, the personal property being, as is contended, in the Austrian subject by the law of his country, and thus travelling about with him; to this I make answer, that the foreign law shall not prevail over ours, where the diversity in the two laws is such

*976 as I have endeavoured to show exists; our law not recognising such property, and holding it therefore to * be impossible. It is like the case of property in human beings, to which I have already adverted *alio intuitu*. In *Somerset's Case*, and the Scotch case of *Wedderburn* (for both countries have the

¹ 14 M. & W. 303.

² 5 C. B. 860.

³ 4 Exch. 145.

⁴ 13 Q. B. 257.

unfading honour of having decided this question), it was in vain that the Master set up his right to the property in his slave by the law of the country to which he belonged, and called upon our Courts to enforce it, as here we are required by this argument to enforce the Austrian common-law copyright. It is sometimes said, figuratively, that the answer given to the Master was, "A slave's fetters fall off the instant he touches British ground." The more literal and homely legal answer was, that our laws are not cognizant of such property as the property alleged ; and can give no aid to the enforcement of rights growing out of it. The same answer I give here.

For these reasons, I am relieved from the necessity of arguing several other points that have been made, on some of which I have a doubt, as on the question whether the Statute 54 Geo. 3 supersedes the provisions respecting attestation ; the inclination of my opinion being, that it does, though there is some force in the argument that both may stand together. But in the view which I take of the case, there is no occasion to go further into these lesser questions ; and I am of opinion that the judgment of the Exchequer Chamber must be reversed, the exceptions disallowed, and the *postea* given to the plaintiff below.

LORD ST. LEONARDS. — My Lords, After the very elaborate arguments which have been addressed to your Lordships, I shall confine what I have to say upon this case within a very small compass. I most cordially concur in what has fallen from my noble and learned friend with regard to the arguments * at * 977 the bar, and the very great assistance which the House has derived from the elaborate opinions which have been delivered by the learned Judges. Whatever conclusion any man may come to upon the point in issue, it is quite impossible not to admire the acuteness, the research, and the judgment which have been exhibited in the opinions with which this House has been favoured by the Judges ; and it is rather the selection only of the grounds of decision, than the formation of an original opinion, which your Lordships are called upon to exercise upon the present occasion.

My Lords, the simple question is, as has been truly stated, whether a foreigner, although actually resident abroad, can, by first publishing here, obtain an English copyright. Now that right has been claimed upon two grounds : first, upon a supposed

or asserted common-law right, and secondly, upon the statute right, to which reference has already been made.

Upon the claim of common-law right, I confess I never have, at least for many years, been able to entertain any doubt. It is a question which I have often, in my professional life, had occasion to consider, and upon which I have arrived, long since, at the conclusion, that no common-law right exists after publication. I never could, in my own mind, distinguish between the right to an invention after the publication of that invention, and the right to the description of that invention after the publication of that description. If a mechanical genius should invent a machine of the greatest importance to mankind, it is admitted, nobody attempts to insist or to argue otherwise, and it has always been considered as settled, that after he has disposed of even a single copy of it, it

may, so far as the common law is concerned, be copied and
* 978 made use of without restriction by the purchaser *or by

any person who properly obtains possession of it. Now, I do not see how you are to estimate differently different kinds of genius, or how you can say that a man who invents a machine of the greatest importance to the State shall not have any right the moment he disposes of a single copy of that article, but that a man, whose mind brings forth a certain collection of words, shall be entitled to an absolute property in it in all time, even after he has published it and let the world at large have it. It appears to me, therefore, and always has so appeared, that there is no such common-law right either in the one case or in the other; and I agree with my noble and learned friend who last addressed your Lordships, that the patent law is decidedly against the common-law right in this particular instance, because it shows that the inventor had not the right. The right of granting a monopoly was originally claimed by the Crown, and was restricted by the statute of James the First; but that is simply a monopoly granted by the Crown under the authority of an Act of Parliament. The Crown, therefore, has the power to grant a patent of an important invention. It is not an objection to an invention that it has been published and used abroad, if the Crown chooses to grant a patent. It depends strictly and wholly upon the right of the Crown, so far as it is not abridged by the Act of Parliament, or if no such right existed in the Crown originally, it depends simply and only upon the statute of James the First. Therefore, that appears to me to

decide very much the question as to the common-law right in this case.

Now, when we are talking of the right of an author, we must distinguish (as has been already very accurately done) between the mere right to his manuscript and to any copy which he may choose to make of it, as his property, just like any other personal chattel, and the * right to multiply copies to the * 979 exclusion of every other person. Nothing can be more distinct than these two things. The common law does give a man who has composed a work a right to that composition, just as he has a right to any other part of his personal property ; but the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of for ever copying his own composition, after he has published it to the world, is a totally different thing. But as to this question of common-law right, I do not intend to enter upon the argument, particularly after the very full discussion of it by my noble and learned friend who has just sat down ; and indeed I cannot at all understand how that question can apply to this case. What possible right can Bellini, or any other person claiming under him, have at common law in this country to the exclusive right of publishing a composition made by Bellini abroad ? If Bellini comes to this country, and owing even a temporary allegiance to the sovereign, acquires the legal rights which belong to every subject, that of course one can understand ; but what right in this country can exist in a foreigner, like Bellini, composing abroad, and residing abroad, but sending his composition here simply for publication. Where is the right ? The common law cannot extend to a foreigner resident abroad, and owing no allegiance to this country. The claim of such a right is distinguishable from any case which has been cited, or which can be cited, which gives a right to a foreigner with regard to damage done to his character, for example, by a person resident in this country ; the cases are altogether distinct. This is a right of property which is claimed within this realm, and that right of property cannot be claimed under the common law by a foreigner who owes no allegiance to this country, and who has never acquired any property or any other right, * in respect of * 980 residence here, or by Act of Parliament or otherwise, to make him a subject of this realm. I am therefore clearly of opinion that whatever may be the view which might be taken as to the

common-law right, that right never can be held to extend to a foreigner situated as Bellini is.

My Lords, the question then comes of course upon the statutes. I think we may fairly consider that it ought not to be denied that, speaking generally, an Act of our own Parliament, having a municipal operation, cannot be held to extend, *prima facie*, beyond our own subjects. It is not that an Act of Parliament may not, like the common law itself, extend its benefits to foreigners who come here and acquire that which it has been the policy of this country to give them ; namely, the rights in a great measure of natural-born subjects. That is not the question, but the question is, Do these Acts of Parliament, or not, give to foreigners, *qua* foreigners, the right which is claimed by Ricordi, as claiming under Bellini, or by the plaintiff as claiming under Ricordi ? That is the question. I venture to represent to your Lordships that it is quite clear, as an abstract proposition, that an Act of Parliament of this country having within its view a municipal operation, having, as in this particular case, a territorial operation, and being therefore limited to the kingdom, cannot be considered to provide for foreigners, except as both statute and common law do provide for foreigners when they become resident here, and owe at least a temporary allegiance to the sovereign, and thereby acquire rights just as other persons do ; not because they are foreigners, but because being here, they are here entitled, in so far as they do not break in upon certain rules, to the general benefit of the law for the protection of their property, in the same way as if they were natural-born subjects.

*981 *Now, I will just draw your Lordships' attention to what had been the state of legislation about the very time that the Copyright Act of the 8th of Anne was passed. In the 7th year of that Queen, we know that there was an Act passed for generally encouraging the settlement here of foreign Protestants : that Act recites that, "The increase of people is a means of advancing the wealth and strength of a nation ; and whereas many strangers of the Protestant or reformed religion, out of a due consideration of the happy constitution of the government of this realm, would be induced to transport themselves and their estates into this kingdom, if they might be made partakers of the advantages and privileges which the natural-born subjects thereof do enjoy." Then, upon taking certain oaths, all foreign Protestants in this country were at once

naturalized. We know that that was afterwards repealed, it being found not to answer the end which the Legislature had in view ; but it shows that just before this Act of Parliament was passed which is now under discussion, the Parliament had held out a strong inducement to foreigners, being Protestants, to become as it were natural-born subjects, to come over to this country, as it is stated, with their wealth, and to add to that which was then considered to constitute the riches of a country, namely, the population of the country. It can easily be understood, therefore, that in any view which the Legislature would take of it, a course which was adopted was intended indirectly to benefit foreigners ; but then they were to be foreigners resident here, the object being to attract Protestant foreigners to this country, and to give them certain benefits when they arrived here. And it is singular enough that in two different Acts of the very same year in which this Copyright Act passed, both Acts having for their object to raise funds for the prosecution of the war, there are express enactments, that natives * and foreigners may subscribe to the *982 sums which are intended and proposed to be raised ; so that when the Acts of Parliament of that period intended to provide expressly for foreigners, care was taken to insert the words "natives and foreigners." Although that fact may not be entitled to very great weight, still it rather helps to guide us to a knowledge of what was the feeling of the time.

Then we come to the Act of Parliament itself. As regards the authorities, I need not add another word, after what has fallen from both my noble and learned friends, because, from the ample discussion which those cases have undergone by the learned Judges, with whose opinions the House has been favoured, and after the observations of my noble and learned friends, I think every one must arrive at this conclusion stated by one of the learned Judges, that this case, for the purpose of decision by your Lordships, is entirely uninfluenced by authority. It is impossible, looking at the whole of the authorities down to the cases which are now before this House for decision, to say that there is any authority which is entitled to any weight. We come, therefore, at once to the cases which are now under review, and upon which your Lordships are required at this time to decide the great and important question now before you.

The statute of Anne is framed in very general words ; it is by

no means scientifically framed ; and singularly enough, in the very statement of it, one would hardly suppose what its object was, for it states in the first place, that the object is to give to authors the right to copies. The Act is called "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned."

Of course the heading of an Act of Parliament does not at all affect its construction ; but

*983 *it is a singular heading, for it does not speak of the authorship, or the right to exclude others from multiplying copies ; but it speaks of vesting the copies in the authors. The truth is, that the copies, as copies, were vested in the authors, without the assistance of Parliament at all. Nobody doubts that a man printing a certain number of copies had the right to those copies, as he had to any other property, if he had a right to print them ; and therefore it required no act of Parliament for that purpose. But the expression "copies" here, of course, is made use of to represent an exclusive right to those copies, as against the rest of the world. Observe, the Act of Parliament itself provides for three things : first, for books that have already been printed ; next, for works composed, but not printed and published ; and, thirdly, for works thereafter to be composed ; and it gave an exclusive copyright for twenty-one years to books already printed. Now, we can nowhere find, upon the face of the Act, any express provision as to the necessity of printing here. Nor can we find any express provision that the first printing shall take place here ; we find neither the one nor the other. It has been decided, and it is no longer to be disputed, nor is it attempted to be disputed, that the first publication must take place here ; but that is only by implication ; it is not by express enactment ; it is only by implication from the provisions in the Act of Parliament. Well, then, if the first publication must take place here, must the printing likewise take place here ? There is no such actual provision ; it is not said so, but I apprehend it is implied ; I think it is clearly implied from the provisions of the Act, that the printing must take place here. When books already printed have the term of twenty-one years given to them, it can hardly be supposed that Parliament meant to provide for books which had been printed abroad,

*984 the *object being clearly, whilst advancing learning and science, to advance also the interests of the British public.

The provisions of the Act of Parliament, I think, clearly settle that point. It is quite clear that Parliament intended to benefit authors, and not importers; but section 7 of the Act of Anne expressly authorises the importation of books in the Greek, Latin, or other foreign languages; that, I think, at once inevitably leads me to the conclusion that no printed books in the English language were to be imported as within this Act of Parliament. I think that is perfectly clear. But the Act of Parliament does not say that books in foreign languages shall be original compositions; therefore I apprehend that it would have authorised the importation of a translation of an English book into a foreign language; but it does, by implication, show that the printing of English books is to be in this country, and not in a foreign country. My Lords, I think, therefore, that as far as regards the right with respect to books already printed, it must be considered to mean books printed here, and not books which had been printed abroad, and imported here; and that will give a key to the meaning of this statute in the other two cases to which I have referred.

There is a later Act of Parliament, the 12th Geo. 2, c. 36, the object of which was to prohibit generally the importation of books reprinted abroad, which had been first composed or written, and printed and published here. That was a general prohibition; but it is impossible to read that Act of Parliament without coming to the conclusion that the Legislature then assumed that the books, to be entitled to the protection of the statute of Anne, must be books printed in this country; and yet there is no such express provision.

Then as to the probable intention. If it is clear, as I apprehend it to be, that, in the first place, a book which is a foreign composition must be first published here; and, secondly, that it must be printed here; would it not necessarily and naturally follow, that the man himself should be here to superintend that publication? Is it not a natural inference from the Act of Parliament, which does not expressly provide for either of the foregoing conditions, that it implies that the man shall be here, to superintend his publication, seeing that it shall not only be first published here, but that it shall also be printed here? Nothing could be further from the intention of the Legislature, at the time that this Act of Parliament was passed, than that a foreigner should be enabled to import books printed abroad; but unless you

put that construction upon the Act of Parliament, he would have been able to import books printed abroad, and bringing them here, to have a copyright in their publication. That would plainly be directly contrary to the intention of the Legislature. I think, therefore, that gives us an easy means of interpretation as to the meaning of the statute, with regard to the residence of the publisher. All that is entirely independent of the general question, whether such an Act of Parliament as this could be considered as intended to benefit foreigners, *qua* foreigners, who are resident abroad. If this Act of Parliament extends to foreigners generally, then there is no reason why they should not publish here while they reside abroad. It seems not to be denied that an English author may reside abroad, and yet may have his rights as an English author, upon publication here. Why? Because he owes a natural allegiance, which he cannot shake off. Residence abroad (although he may thereby have come under some new obligations, or have acquired some new rights) will not relieve him from his

natural allegiance; he cannot be relieved from it by any

* 986 * foreign country, and therefore he carries with him the natural rights of a subject of England wherever he goes. That gives him, though resident abroad, the right to publish here, because he has always fulfilled the implied condition of being a subject of, and owing allegiance to, the Crown of Great Britain. That could not, of course, be said of any foreigner who was not actually resident here.

Now, my Lords, in the case which has been referred to of *Clementi v. Walker*,¹ Mr. Justice Bayley, speaking of the statute of Anne, makes a few observations, in which I entirely concur, with regard to the intention of Parliament to confine the provisions of the statute to British interests. He says: "The statute of Anne, therefore, not only gives protection to authors as to books thereafter to be published, but to books previously printed; but the British Legislature must be supposed to have legislated with a view to British interests and the advancement of British learning. By confining the privilege to British printing, British capital, workmen, and materials would be employed, and the work would be within the reach of the British public. By extending the privilege to foreign printing, the employment of British capital, workmen, and materials might be superseded, and the work might never find

¹ 2 B. & C. 861 – 867.

its way to the British public. Without very clear words, therefore, to show an intention to extend the privilege to foreign publications, I should think it must be confined to books printed in the kingdom; and instead of there being any such clear words to show that intention, there are provisions which strongly imply the latter." I may observe that there is some incorrectness in this opinion of the learned Judge, because he seems to suppose that, "by extending the privilege to foreign printing, the employment of British capital, workmen, and materials might * be * 987 superseded"; that is true; but he adds, "and the work might never find its way to the British public." There is some error in that, of course, because unless the work did find its way to the British public, it never could claim, in any possible sense, copyright in this country; consequently every book, even if printed abroad, must find its way to the British public before it could claim the benefit of that Act of Parliament. But the opinion of the learned Judge, that the Act involves the necessity of printing in this country, is one in which I entirely agree.

If there is no common-law right, which, in my opinion, there clearly is not, and if the statute does not apply to foreigners, *qua* foreigners (although I entirely, of course, admit, that when a man owes a temporary allegiance, he is entitled to the benefit of it), then there being no common-law right, it would be a new right given by Act of Parliament, and the foreigner must bring himself within the terms of that Act of Parliament in order to enjoy it; and to do so, in my apprehension, he must be able to predicate of himself that he is a subject of these realms, at least for the time being.

Your Lordships' attention has already been sufficiently drawn to what was so much pressed upon you in argument, namely, the alleged absurdity, that a man might pass over from Calais and obtain the right here; whereas by remaining at Calais he could not acquire that right. Really that has no bearing upon this question; it does not depend upon whether the author is on the other side of the Atlantic, or is on the other side of the narrow channel between Dover and Calais, and can get over here in two hours; that is not the question: the question is, let him be where he will, is he or is he not a foreigner residing out of this realm, and claiming the benefit of copyright within the realm, whilst he is resident abroad. Whether, therefore, it is the * case of a man residing at Calais or on the other side * 988,

of the Atlantic, it is exactly the same thing, and the attempted distinction has not the slightest bearing upon the subject.

It is then said, that there is a difficulty with respect to what constitutes a residence here. Now, I will not take upon myself to state any opinion to your Lordships as to what would be a sufficient residence; but I will say this, that whatever would constitute a man a resident here, so as to make him subject, in point of allegiance, to the country, whilst he was here, and would give to him the common rights to which every foreigner coming to this country is entitled, would be a residence which would give him a copyright here if he published here. My Lords, it is much easier to deal with an implied right of this sort under the statute of Anne; that is, a right implied from his residence here; for you then have only to ascertain whether the residence is such as to make him owe temporary allegiance, and to give him temporarily the rights of a subject; it is much easier, I say, to deal with such a right than it would be to deal with the case of an express enactment that a man should not have the right unless he was a subject of these realms, or was resident here. If we had an enactment which expressly said that no one should have a copyright here, unless he was a native or a resident, the question would at once arise, what was the meaning of residence under the Act of Parliament; and it would be much more difficult to deal with the question under that enactment than with the general right of foreigners under the statute of Anne, namely, considered as coming under that statute, like any other statute, or under the common law, as persons resident here, acquiring the right of subjects, and being temporarily subject to the obligations of the English law.

*989 * There is no such difficulty in the American legislation.

The Legislature of the United States has expressly enacted that copyright there shall be confined to natives or to persons resident within the United States; those are the express words of the Act of Congress, and there has not been found any difficulty at all in deciding what was residence. We have been pressed very much at the bar with the difficulty of stating what would be a sufficient residence; but there is no reason why we should have any difficulty in this case upon that ground. The American law also takes care to prevent copyright attaching upon importation. The consequence of that of course is, that people are enabled to import the works of other men, for the copyright of

which they have never paid any consideration. And I may remark, in passing, that, although nothing could be more improper than to consider the state of international law in deciding a question upon our own municipal law (for here we must decide this question, not with reference to the relation in which we stand to the United States, or any other country with respect to copyright, but as it regards our own law in the abstract, without reference to any other country at all), yet I may observe that the strained construction which would give to a foreigner the right which is now claimed, would have the effect of placing this country not on a level with the United States. For example, the United States do not allow a foreigner resident out of them to obtain a copyright there ; but the American publisher imports his books the moment they are published, and sells them without difficulty and without interruption. In the United States they attempted to bring in a bill in order to reconcile the laws of the two countries, and to put authors upon the same footing in each country. That attempt did not succeed. That of course does not show what our law is, but it shows that we are not called * upon to put any strained * 990 construction upon our own Act of Parliament in order to give to foreigners a right which their law denies to us. If, however, I found that in our Act of Parliament the right was given, I should not stop to inquire whether or not it was given in the United States, because I must be bound by our own law, and put a proper construction upon that law. As it regards that point, however, with respect to residence, I do not feel any difficulty.

I may observe, in passing, with reference to printing here, that the case of *Page v. Townsend*,¹ which has been already referred to, although upon a different point, has a bearing upon that subject. It was there held, that prints engraved and struck off abroad, but published here, were not protected from piracy under the Act ; and therefore if works could be printed abroad, and then, being imported, could obtain a copyright here, you would be giving to works of a general nature a right which is not extended to prints and engravings. On the whole, therefore, my own opinion in the abstract upon the general question is, first, against any common-law right, and, if the common-law right existed, clearly against the right of a foreigner to claim the benefit of it, and secondly, against such a construction of the statute of Anne as would give

¹ 5 Simons, 395.

to a foreign author, resident abroad, the right possessed by an Englishman upon a first publication here.

But there are other considerations in this case, which have been elaborately argued, and upon which the case may turn, and to which I think it proper shortly to call your Lordships' attention. The first question is, whether there is, in the person who claims here the exclusive power of publication, any right whatever to copyright in this country. The bill of exceptions states it in this

* 991 way ; that there is by the law of Milan a copyright in Bellini, and that * Bellini transferred that copyright to Ricordi.

Now, just stop there for a moment, and let us see how it will stand. A copyright by the law of Milan can of course have no effect in this country. I do not myself quite understand the doctrine of jurists, when they say that a first publication abroad gives a general right ; because it is rather difficult to conceive, that if a man publishes in his own country, and the copyright is secured to him by the law of that country, giving him, under the sanction of that law, a limited right in his own country, that he thereby acquires in all other countries an unlimited right. If you were to look at international objections, it would be rather difficult, perhaps, to come to that conclusion ; but, however, that is rather a separate point. Now, the law of Milan, which gave to Bellini this copyright, could, of course, give him no right in this country ; that is perfectly clear. But it is said that he has a right to his composition, such as he would have to any personal chattel, and that that right being properly transferred, as is stated in the bill of exceptions, by the law of Milan to Ricordi, who afterwards transferred it to Boosey, therefore the right now exists in Boosey. The first question is, how can a right exist in Bellini as a foreigner to copyright in this country ? He has it by the law of Milan, because he is a native-born subject, or a subject, at all events, by residence ; and the law of that country gives it to him ; but the moment he steps out of that country, he can have no other right than is involved in the mere possession of the subject matter in his hands, except so far as the law of any country to which he resorts may give him such a right. Then in order to obtain copyright here, he must come and perform, as I have already shown, the condition annexed to the enjoyment of that right ; and I hold it to be perfectly clear that that condition is, that he must

* 992 reside in the country. * Then, if that is so, as Bellini

did not perform the condition, he never had the right to assign, and he could not assign that which never existed. Remaining abroad, he could not have the right, for the common law of this country gave him no such right. Neither did the statute law of this country give him any such right. Therefore, whilst at Milan, he had a Milanese copyright; but he had not, and could not acquire, a British copyright; and if he had no right in this country, he could assign none. I hold it, therefore, to be perfectly clear that that would be of itself an answer to the claim.

But I think that in the argument at the bar it was said that there was an assignment of the general right to the copy, and that therefore the party bringing it here would be entitled to the benefit of the statute. If you will look at the bill of exceptions, you will find it stated (it may be a technical construction, but I hold it to be a statement out of which you are not at liberty to depart) that the thing assigned by Bellini was the Milanese copyright. Then, if it was the Milanese copyright, and that copyright gave no right here, and the condition had not been performed which must be performed before any right could be acquired here, the assignment was altogether void as regards this country, and consequently it could not transfer any right to Ricordi. But supposing it did transfer a right to Ricordi, then what right did Boosey obtain under Ricordi? Why, the assignment from Ricordi to Boosey was expressly confined to publication in this country. Now, if there is one thing which I should be inclined to represent to your Lordships as being more clear than any other, in this case, it is, that copyright is one and indivisible. I am not speaking of the right to license; but copyright is one and indivisible; or is a right which may be transferred, but which cannot be divided. Nothing could * be more absurd or inconvenient than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the inconvenience would be. You might have a separate transfer of the right of publication in every county in the kingdom. If, however, the right, as I am advising your Lordships, is properly one and indivisible, then let us see what construction can be put upon the assignment from Ricordi to Boosey. The exercise of the right is confined in that assignment to the United Kingdom. Now, by the 41st of Geo. 3, c. 107, copyright is extended to any part

of the British dominions in Europe, and by 54th of Geo. 3, c. 156, it was further extended to every other part of the British dominions. It is quite clear, therefore, that if in this case there was a copyright, under the law of this country it was a copyright which extended to every portion of the British dominions. Then, as Ricordi limited his assignment to the United Kingdom, and therefore reserved to himself the right as regarded the publication in every other part of the British dominions, even considering the right in England, if I may so call it, as being capable of being secured from any foreign right, it would consequently be a partial assignment; and as a partial assignment, I should venture to recommend your Lordships to decide that it was wholly void, and therefore gave no right at all.

There is also, let me observe, this particularity, that as the assignment from Ricordi is confined to the United Kingdom, Ricordi himself might, without any breach of his contract, have published this composition in any other part of the British dominions; he might also, by his Milanese right, have published it the very next day in Milan, without infringing on the right of

*994 Boosey under the assignment. *The more, therefore, the question is considered, the more, I apprehend, it will appear clear that the assignment in question was void, because it was limited to the United Kingdom, and did not extend to the whole of the British dominions; and that objection exists independently of the question, whether the Milanese copyright could be reserved, and the supposed right in England could be assigned.

My Lords, there is another question which would also decide the case in one view of it; and that is a question upon the assignment itself. I hold it to be perfectly clear, that if, according to the proper construction, an assignment of a copyright ought by the law of England to be attested by two witnesses, no assignment of a copyright, the benefit of which is claimed by the assignee, although from a foreigner, can be held good in this country unless it is so attested. It is not a question whether the Milanese copyright could be assigned by the law of Milan, for the law of Milan has no effect here. And if, in order to protect the public and the author, Parliament has thought fit to enact, that the assignment shall be attested by two witnesses, then that must equally apply to every person claiming the benefit of the statute, whether he is a foreigner or not; because, as I have already re-

peatedly stated, the question is not whether he is a foreigner or not, but whether, being a foreigner, he owes such a temporary allegiance to the Crown of this country as gives him the right under the statute. It is very true, that the statute of Anne does not in words expressly require that there should be two witnesses to an assignment, but the statute requires that there should be two witnesses to a consent; and it has been established by several authorities, and among others by the case of *Davidson v. Bohn*,¹ decided since the 54 Geo. 3, that an assignment must be attested by * two witnesses. The ground of that decision is simply this, * 995 that when it was found that by the Act of Parliament the consent to a publication must be attested by two witnesses, it was naturally to be inferred that an assignment, which was of a higher nature than a mere consent, must have the same solemnity. Now that has been a settled point, which your Lordships, I am sure, will not disturb. I may observe that the 41 Geo. 3, c. 107, required the consent to be in writing, and to be signed in the presence of two or more credible witnesses. The 54 Geo. 3 recited the former enactments, generally extended the copyright, and spoke of the consent in writing, but said nothing about the two witnesses. It is to be observed that opinions have very much differed upon this question. On the one hand, it has been said that it was only by implication from two witnesses being required to the consent, that it was held by our Courts that two witnesses were required to an assignment; and that therefore, when the latter Act, the 54 Geo. 3, c. 156, no longer required two witnesses to a consent, the reason failed for requiring, by implication, two witnesses to an assignment. I cannot go along with that reasoning. It appears to me that it was properly decided that the assignment ought to be attested by two witnesses; that was decided upon the Act of Anne, as it stood originally, and as it was originally, and properly, construed. Then, if by a later Act you take away that which was no doubt the ground of the decision, namely, the necessity for two witnesses to a consent, does it follow that you therefore repeal that which was the proper construction of the law applicable to the higher instrument; namely, that the assignment also required two witnesses? It would rather seem, after such a tenor of determinations, after the law had been so settled, that the Legislature, by being silent with regard to the assignment, meant that to

¹ 6 C. B. 456.

* 996 remain, although it altered * the law with respect to the consent ; and, therefore, I should certainly advise your Lordships, if it were necessary to come to a conclusion upon this point, that it was rightly decided that the assignment ought to be attested by two witnesses, and that that was not altered by the Act of the 54 Geo. 3. The Act of Anne, and the Act of the 54 Geo. 3 may well stand together ; the latter one does not repeal the former expressly, and there is no reason why it should do so by intendment ; and with respect to the assignment, the Act of Anne being referred to generally by the 54 Geo. 3, must be considered to be referred to as bearing the construction put upon it by the authorities.

Upon all the grounds which I have stated, I have come to a conclusion satisfactory to my own mind, but at the same time not without great consideration and much hesitation ; not hesitation, I must candidly say, created by any doubt which I have myself felt ; but I have been impressed, and properly impressed, not only by the argument at the bar, but by the elaborate opinions which have been delivered on the other side by some of the learned Judges. Agreeing, as I do, with my noble and learned friends in the conclusions at which they have arrived, my advice to your Lordships is, that the decision below should be reversed.

Judgment of the Court of Exchequer Chamber reversed.

Judgment of the Court of Exchequer affirmed.

Lords' Journals, 1st Aug. 1854, p. 455.

1853. April 28, 29 ; May 2, 3 ; August 20.

JOHN OWEN and J. M. GUTOH, *Appellants.*
SARAH HOMAN, *Respondent.*

Married Woman. Separate Estate. Receiver. Fraud. Principal Debtor. Giving Time. Surety. Practice.

It is a matter of discretion for the Court of Chancery whether it will or will not interfere by *interim* order respecting the property of a litigant. If the property is *in medio* (in the actual enjoyment of no one), the Court will interfere for the benefit of all concerned.

When a married woman, having separate estate, is a party to a suit, the interference will be accorded or refused according to the circumstances of the case.

Where the Court summarily interferes against the legal possession, it has a right to expect a plaintiff to proceed with the most complete and honest diligence to obtain a decree. Delay in his proceedings constitutes an objection to the proposed interference.

Though a creditor may not, in every case, be bound to inquire into the circumstances under which a third person becomes surety to him, he is so when the dealings between the parties are such as to lead to a suspicion of fraud.

It is a general rule that a creditor may give time to a principal debtor without prejudicing his right against the surety, provided he expressly reserves such right. Circumstances may, however, prevent that rule from having effect.

A creditor of a partnership, consisting of two persons, had received from one of them joint and several promissory notes, accepted by himself and a third party, a married woman, having separate estate. The partnership was afterwards dissolved by deeds, by virtue of which the second partner, on giving up certain title deeds, was altogether exonerated from liability to the creditor, who, however, expressly reserved his rights on all notes and other securities which he held in his hands at the time of the execution of these deeds. These transactions were wholly unknown to the third party, who was the surety on the notes. There were various circumstances which might have awakened the suspicion of the creditor, and he had not taken any steps to inform the surety as the notes became due that she had become or continued liable upon them. In a bill for an account and a receiver, filed by the creditor, the surety put in an answer detailing these circumstances, and alleging fraud:—

Held, affirming the decree of the Lord Chancellor (who had reversed an order of the Master of the Rolls), that this was not a case in which the Court would interfere by appointing a receiver.

An objection in respect of parties to an appeal must be taken before the Appeal Committee.

* THE appellants, in the year 1844, and for several years previously, had carried on the business of bankers at Worcester, under the name of Farley & Co. The respondent was a married woman, who possessed property acquired from her first husband, which property was, on her second marriage, settled on her for life, with a power of appointment thereof by deed or will. The appellants had acted as the bankers of a partnership of grocers, wine merchants, and provision dealers at Worcester, trading under the name of Harris, Bowers, & Co. This partnership consisted of two persons, named Mary Ann Harris and John Bowers. The appellants, being in advance to this partnership, had pressed Bowers, who alone acted in the management of the business, for some security, and Bowers had, on different occasions, brought them joint and several promissory notes and bills of exchange, signed

by himself and by the respondent. The partnership of Harris & Bowers having become bankrupt, the appellants, on the 29th November, 1849, filed a bill against the respondent, and against her husband, and the trustee under her settlement, to compel payment of the notes to which she had been a party.

The bill set forth the transactions between the appellants and Bowers, the delivery of the notes and bills, and the settlement on the respondent's marriage, and prayed that it might be declared that the rents and profits, &c. of her separate estate under her deed of settlement were liable to the plaintiffs for the principal and interest due on three promissory notes, dated respectively 28 December, 1844, for 1000*l.*, 2 April, 1845, for 500*l.*, and 20 January, 1848, for 3000*l.*, and that the sums due thereon might be raised out of the said estate, the plaintiffs being ready and willing to account for any monies received from the respective estates of Harris & Bowers on account of such notes, or any of *999 *them, and that an account might be taken and a receiver appointed.

The respondent, in March, 1850, put in her answer to the bill, in which the following allegations were made: She admitted the possession of separate estate under the will of her first husband, to whom she was married in 1798, and who died in 1829, and the settlement of the same estate on her second marriage in November, 1836. She stated that she had formerly employed one Matthew Elgie, of Worcester, as her attorney and solicitor, and then one Thomas Jones, of the same place, in the same capacity; that each of these persons had quitted Worcester, carrying with him some of her papers; that in August, 1843, she had a serious fall, which caused her for a time to be deprived of her mental faculties; that she was now in the eightieth year of her age, and that her memory as to recent occurrences had become enfeebled and perplexed. She then averred that John Bowers (who was her nephew), in or about the month of December, 1844, applied to her, stating that he wished to borrow a sum of money of the firm of Farley & Co. for a short time for the purposes of his partnership, and requested her, as a temporary security for such advance, to join him in a bill of exchange or promissory note to the said firm for 100*l.*, which, after considerable hesitation, she agreed to do, he promising that he or his partner would pay the same at maturity, and she accordingly joined him in a bill or note, which she had since found to have

been really drawn for 1000*l.*, the date whereof she was unable to set forth : That she believed Bowers almost immediately took the bill or note to the banking-house of said firm of Farley & Co., and obtained an advance to his said partnership on the security thereof, which advance, however, was debited, as she now believed, to the partnership account : That some considerable time afterwards Bowers again applied to her, and * requested * 1000 her, for the purpose of enabling him to procure a further advance from the bankers, to join him in a bill or note to their firm for 500*l.*, and in reply to the objections which she made so to do, urged that she would be incurring no risk, for that it was a mere matter of form, inasmuch as Harris, Bowers, & Co. would take up the bill or note, as he alleged that they had done with respect to the former bill or note : That she, relying upon such statement and promise, consented to join Bowers in such note, and did so accordingly ; and she believed that Bowers immediately took the same, the date whereof she was unable to set forth, to the firm of Farley & Co., and obtained an advance to his said partnership on the security thereof, which was debited to the partnership account : That some considerable time, and as she believed, full three years afterwards, Bowers again applied to her for a similar accommodation, to the extent, as she understood and believed, of 300*l.*, stating that he had made some large purchases of tea at cash prices ; and in order to induce her to comply with such request, stated that the bill or note which he then wanted would be provided for by his firm, as he alleged that the said two former bills or notes had been : That, confiding in such representations, and being aware that although she had on more than one occasion called at the said bank, and although Mr. Veale, the managing clerk of the bank, had frequently visited at her house since she had joined in such bills or notes, no applications had ever been made to her by or on behalf of Farley & Co., or any other person or persons, for payment of the same, nor any mention of either of them had ever been made to her, she complied to the last-mentioned request of Bowers, and either gave him a note, or accepted a bill for, as she was then told, the sum of 300*l.* (she denied ever having joined Bowers in a note for 3000*l.*) drawn upon her

* by Bowers, the date whereof, however, she was unable * 1001 to set forth, but which bill or note was afterwards, as she had been informed and believed, handed over by Bowers to the

bankers : That the bankers were, as she, defendant, verily believed, fully cognizant of all the representations made by Bowers to her to induce her to join in, or to give the several bills or notes, and of the representations made to her that the two first-mentioned bills or notes had been satisfied prior to Bowers applying to her for the said third and last-mentioned bill or note : That the said Farley & Co. did, in fact, after the bills or notes respectively came to their hands, receive from or on account of the partnership of Bowers, Harris, & Co. divers sums of money to an amount much more than sufficient to satisfy and pay the amounts of the said several bills or notes : That she had recently discovered that prior to and at the time of each of the said three several applications to her by Bowers, the partnership of Harris, Bowers, & Co. was very largely indebted to Farley & Co. : That she believed it was at the suggestion of Farley & Co. that Bowers made such applications to her, and that they purposely concealed from her the state of their account with Harris, Bowers, & Co., in order that Bowers might prevail upon her to join in such bills or notes : That Farley & Co., between the middle of 1844 and December, 1848, entered into large speculations with Harris, Bowers, & Co., respecting the purchases of wine, tea, coffee, and other goods, and that Harris, Bowers, & Co. from time to time deposited with Farley & Co. wine, tea, and coffee warrants, or other securities ; that many of such securities had since been realized by them, and that others to a large amount still remained in their hands, but that Harris, Bowers, & Co. were still made to appear indebted to

Farley & Co. in 17,448*l.* and upwards : That Harris,
* 1002 Bowers, & Co. * were hopelessly insolvent in December, 1848 ; and that their insolvency was well known to Farley & Co., who sedulously concealed such insolvency, in order to secure to themselves priority of payment over the other creditors of Harris, Bowers, & Co., and that in order to obtain such priority of payment, they concocted the scheme appearing from certain deeds and instruments thereafter stated, and the dissolution of the partnership, and the formation of a new partnership between said John Bowers and his brother and sister-in-law : That she believed that some time prior to 22d December, 1848, a meeting took place between Farley & Co., and Harris, Bowers, & Co., for the purpose of investigating the affairs of the latter, at which meeting it was discovered that Harris, Bowers, & Co. were wholly insolvent, and

it was made to appear that 17,448*l.* and upwards were due from Harris, Bowers, & Co. to Farley & Co. on the 2d December then instant, the said sum including the sums, if any then remaining, due to Farley & Co. in respect of the monies collaterally secured by the respective bills or notes of her, this defendant.

The answer then alleged an arrangement between Harris, Bowers, & Co. and Farley & Co., by which the partnership of the former was to be dissolved, and Mary Ann Harris was to be released from all liabilities in respect thereof; that she should assign to Bowers all her interest in the partnership assets, and that he should execute to Farley & Co. a bond for the amount of the partnership debts, and should authorise them to collect in all the outstanding assets of Harris, Bowers, & Co., and to apply the same in liquidation of their claims. The answer went on to allege the execution of certain articles of agreement and a bond (afterwards fully set out), and to aver that Veale, the managing clerk of Farley & Co., was employed by night to take a private account of the stock of Harris, * Bowers, & Co., and that *1003 David Nash, of Worcester, accountant, was employed to collect the debts due to that partnership; but in order to conceal the real object of such collection of debts, it was stated, in a circular sent to the debtors, that the debts were got in in consequence of a change in the partnership.

The answer then set forth the articles of agreement thus referred to. They were dated 22d December, 1848, and made between Mary Ann Harris of the first part, John Bowers of the second part, and the plaintiffs of the third part, and by them it was agreed that Bowers should take upon himself the payment of all the outstanding debts of the partnership of Harris & Bowers, and particularly the debt due to Farley & Co. of 17,448*l.*, as settled up to that date, with interest, and that Bowers should, as the consideration for Mary Ann Harris retiring from the partnership, undertake to give up to her within three years next ensuing the title deeds relating to her house and premises in the Corn Market, Worcester, where the partnership business was then carried on, and that Bowers should carry on the business, as and from the 22d December, upon his own account, and that in the mean time and until he delivered up her title deeds, &c., he should pay her for life 100*l.* per annum, and should be at liberty to exonerate himself from the further payment of such annuity at any

time upon his handing over to M. A. Harris her title deeds, &c., and paying all arrears of such annuity up to such time, and paying the partnership debts, and which title deeds were then deposited by her with Farley & Co. as a collateral security for the floating balance of their debt; and that Bowers should release M. A. Harris from all partnership debts and liabilities, and should pay Farley & Co. the debt of 17,448*l.* by monthly instalments of 200*l.* per month, and in default in paying any one instal-

*1004 ment, * the whole debt should be immediately recover-

able, with all interest thereon; and Bowers should execute to Farley & Co. his bond as a further security for the payment of said debt in manner aforesaid; and that such bond should be deemed and taken to be an additional or a collateral security only for the payment of the partnership debt, and should in no wise be deemed to be a release, satisfaction, or extinguishment thereof, or of the liability of M. A. Harris; and that said debt should be payable to Farley & Co., who should have the same remedies for the recovery thereof as if said bond had not been taken, and that while such instalments should be duly paid, the existing sureties for Farley & Co.'s debt of 17,448*l.* should not be proceeded against, except to save the statute of limitations: Provided, nevertheless, that in case of the death, bankruptcy, or insolvency of any surety, then the whole amount due from him or her to be immediately thereupon paid to and recoverable by Farley & Co.; and that if default should be made in payment of any instalment of 200*l.* a month, or if any surety should die or become bankrupt or insolvent, then the debts of the sureties should be immediately thereupon recoverable by Farley & Co., who should be at liberty to take proceedings at law or in equity against all or any of such sureties; and that Bowers should forthwith use his best endeavours to dispose of the wine and spirit trade, the monies arising therefrom to be immediately paid to Farley & Co., in part reduction of their debt; and that in consideration of the previous articles in said agreement contained, and of said debt being collaterally secured by the bond of Bowers, and of M. A. Harris having given up her interest in said businesses, the appellants agreed

*1005 with M. A. Harris not to take or institute any proceedings at law or in equity or in bankruptcy against *her, M. A. Harris, for recovery from her of their said debt of 17,448*l.* or any part thereof, save and except as might

be necessary for the purpose of recovering the same against Bowers, and suing and proceeding against M. A. Harris jointly with said John Bowers for that purpose, and save and except that they should be at liberty to call upon M. A. Harris to execute (and said M. A. Harris thereby agreed, when so called upon, to execute) a mortgage to them of said premises in the Corn Market, Worcester, with the usual power or trusts of sale, and other usual or necessary clauses and agreements, but that such mortgage was not to contain any covenants on the part of said M. A. Harris for the payment of said debt, and that in the mean time, and until such mortgage should be so executed, the title deeds and writings of said premises to which they related were to remain liable to said debt and interest; and it was thereby provided that in case the appellants should bring any action or take any proceedings either at law or in equity against M. A. Harris and Bowers for the purpose of recovering any portion of said debt from Bowers, it was expressly understood and agreed not to levy execution against M. A. Harris or against her real or personal estate; and it was thereby agreed that the several matters and things therein-before contained should be forthwith carried out, and the expenses attending the same, as also the expense of Farley & Co.'s solicitors, to that time, should be borne by Bowers, and that said agreement, or any article, clause, matter, or thing therein contained, or the giving or accepting said bond payable by instalments as aforesaid, should not in any wise or in any event be deemed or construed to prejudice, annul, or otherwise affect the rights or remedies of Farley & Co., upon or against any person or persons liable as sureties or otherwise, or as drawers, indorsers, makers, or acceptors of any bill or bills of exchange, or promissory note or notes, or *other securities which they, Farley & Co., *1006 then held, but that all such persons should be liable thereon by virtue of such securities to the same extent and manner as they otherwise would have been had those presents not been made, or such bond given, any rule or practice in law or in equity to the contrary notwithstanding; and that Farley & Co. should not take or institute any proceedings at law or in equity against Bowers so long as said monthly instalments of 200*l.* per month were duly paid, except in respect of the happening of the events thereinbefore mentioned, or any of them, and except at the instance or request of said sureties, or any of them, and except

also on the event of Bowers making default in any or either of said articles therein contained on his part.

The answer then alleged that said Bowers executed a bond, dated 22d December, 1848, to the plaintiffs, in the penal sum of 34,896*l.*, and that it was by such bond recited that Bowers and M. A. Harris, his partner, were jointly indebted to the plaintiffs in the sum of 17,448*l.* on their banking account up to the second day of that month; and that Bowers had to execute unto the plaintiffs his bond as a collateral or further security for the payment to them of said debt of 17,448*l.* by instalments in manner thereinafter mentioned; and the condition of the said bond was, that if Bowers, his heirs, &c. should pay unto plaintiffs, their executors, &c. the full sum of 17,448*l.*, together with 5*l.* per cent. interest, to be computed from the 2d of that month, until the whole of said principal sum of 17,448*l.* and interest, at the rate aforesaid, should have been fully paid, then the bond was to be void; and it was provided, that in case default should be made in payment of any of the said instalments, the whole of the principal sum of 17,448*l.* and interest, or so much, &c. should forthwith immediately upon such default become due and payable to the said plaintiffs, and be recoverable by virtue of

*1007 *the bond. And that if Bowers should die, or become

bankrupt, insolvent, or make any composition with his creditors, or permit any execution of *fieri facias* or *capias ad satisfaciendum* to issue against him before the whole of the debt of 17,448*l.* and interest had been paid and discharged to the plaintiffs, &c., then that the whole of the principal sum of 17,448*l.* and interest, &c. should immediately upon such death, bankruptcy, insolvency, assignment, or suffering execution to issue, as the case might be, become payable to the plaintiffs, and be recoverable by virtue of said bond.

The answer then alleged an indenture made between M. A. Harris and J. Bowers on the 22d December, 1848, by which they dissolved their partnership from that day, and M. A. Harris assigned to Bowers all the stock, debts, books, &c. It then set forth an indenture of the 29th December, 1848, between M. A. Harris and Bowers, by which, after reciting their previous agreement to dissolve partnership, and the existence of a debt of 17,448*l.* due from them as partners to Farley & Co., and that Farley & Co. held as a collateral security the title deeds of the premises occupied by

Harris & Bowers in Worcester, with an agreement by her to execute a mortgage of such premises, and that it had been agreed that she should be released from all personal liability for the payment of the debt, and that Bowers should pay the whole by instalments, but so as not to affect the deposit of the title deeds which should remain in the hands of the bankers ; and reciting the articles of agreement of 22d December, 1848, it was witnessed, &c. ; and then the agreement of the 22d December was carried into effect.

The answer then alleged the execution and deposit of deeds, in conformity with the agreements, and also the payment of large sums of money, which were declared to * have been * 1008 paid to Farley & Co. on account of the partnership debts of Harris, Bowers, & Co., and it went on to state various particulars in order to show that the respondent had been deceived into giving these notes, and that the appellants were aware of all the circumstances under which she had given them ; and she submitted that, by the transactions which had thus taken place, she was released as surety from the payment of any part of the monies theretofore due from Harris, Bowers, & Co. to Farley & Co.

The case came on to be heard on a motion for appointing a receiver ; and the Master of the Rolls made an order for a receiver,¹ which order was taken by appeal before Lord Chancellor Truro, who directed the same to be discharged.² The present appeal was brought against his Lordship's decision.

[At the beginning of the argument for the respondent, it was noticed that the only respondent who appeared at the bar was Mrs. Homan ; and it was said that her husband had not even been served with the petition of appeal. It was answered that he was only a nominal party, and, as the claim related entirely to the separate estate of the wife, that he was not affected by it, and must stand by and submit to any decree that was made ; and further, that he had been served with the original bill, and had put in an answer disclaiming all interest.

THE LORD CHANCELLOR.—The objection, if otherwise well founded, could not be urged now. An objection for defect of parties must be taken before the Appeal Committee.]

¹ 13 Beav. 196.

² 3 Macn. & G. 378.

Mr. Rolt and *Mr. Hallett* for the appellants. — The respondent here, a married woman, is possessed of separate property. By the principles of equity, that property became liable to the pay-

* 1009 ment of the securities she * had joined in making. This liability can only be enforced as against a married woman by the Court granting the application for a receiver. The respondent has a power of appointment, but cannot be compelled to exercise it, and, except that, she has only a life estate in the property. She is nearly eighty years of age, and under these circumstances the appellants are entitled to the order for a receiver, for as to them the property must be deemed perishable property. The respondent is a surety to the appellants on behalf of their debtor. They have entered into an arrangement with that debtor, by which they have given him time, and which may be taken to have been entered into without the knowledge of the surety; but the creditor expressly reserved all his rights against the surety, and the question is, whether that giving of time to the principal could, under these circumstances, operate as a release of the surety? It is submitted that no such effect can be attributed to it.

One of the arguments for the respondent in the Court below was, that the principal debt was gone, and that a new debt was created by the bond given by Bowers. But the answer to that is, that by that bond itself the right was reserved against the surety, who received an advantage at the same moment, and by the same instrument. The deed of the 29th of December dissolving the partnership cannot be relied on against the appellants, for they were not parties to that deed.

The appellants made express reservation of their rights against the principal debtor, and the surety has all the same rights and remedies as before. The creditor is not bound by the English law,

at all events,¹ to sue the principal debtor before he comes * 1010 on the surety. He must, therefore, * do some express act before he relieves the surety. The merely giving time to the principal is not an act of that kind, for here the creditor has reserved all rights on the securities, and consequently all the rights of the surety on them are continued. A discharge of a surety has not the effect of discharging the principal without

¹ *Wright v. Simpson*, 6 Ves. 734, per Lord Eldon. See the difference between the English and Scotch law in this respect: *Bonar v. Macdonald*, 3 H. L. Cas. 227, note.

reserve, and therefore a co-surety is not discharged: *Ex parte Gifford*.¹ There *Burke's Case*² is referred to, and that shows that the reservation of the right to go against the surety leaves the matter unaffected by a mere grant of time to the principal. In *Boultbee v. Stubbs*,³ Lord Eldon, in explaining the law, laid down that as the principle on which the decision was to proceed, and the result of that case is to be explained by the peculiarity of the facts which existed there. If the remedy is not reserved, but there is a simple discharge of the principal, of course the surety is discharged; but the reservation of the remedy prevents the arrangement between the principal and surety from having that effect. That principle was adopted in this House in the case of *The Bank of Ireland v. Bereford*,⁴ and in the course of his judgment in that case, Lord Eldon remarked, that, under certain circumstances, a bill of exchange might be a principal, and a bond only a collateral security; a remark that will be found applicable in the present case, in answer to the argument that may perhaps be raised that the taking of a bond from the principal debtor was of itself a release of the surety, who was only a surety on an instrument of a lower nature.

In *Ex parte Glendinning*,⁵ it is expressly stated that if there is a reserve against the surety he is not discharged, though if there is no reserve he will be discharged, for in *many *1011 cases the compromise will be for the benefit of the surety; and that doctrine is still more emphatically declared in *Ex parte Carstairs*.⁶ The cases at common law show that the giving of time to the principal does not necessarily release the surety: *Nichols v. Norris*.⁷ There A., who, without receiving consideration, had made a promissory note, which was used by B. in payment of goods supplied to him, was held not to be discharged from liability on the note by the circumstance that B. had entered into a deed of composition with the creditor, for such deed reserved the creditor's rights against A. The same principle was adopted in *Maltby v. Carstairs*,⁸ and *Kearsley v. Cole*,⁹ the latter of which is a stronger case, because there the reservation of the remedy against

¹ 6 Ves. 805.

² Buck's Bankruptcy Cases, 560.

³ See post 1020 (d).

⁴ 3 B. & Ad. 41.

⁵ 18 Ves. 20.

⁶ 7 B. & C. 735.

⁷ 6 Dow, 233.

⁸ 16 M. & W. 128.

⁹ Buck's Bankruptcy Cases, 517.

the surety had been consented to by him. The merely giving time is not necessarily a release: *Smith v. Winter*;¹ and where a right against the surety who was liable on a bond has not been reserved by writing, but only upon an understanding between the parties (of which parol evidence was in that case admitted), the surety will not be discharged by the creditor taking a promissory note for the amount from the principal: *Wyke v. Rogers*.² In *Smith v. Winter*, Mr. Baron Parke³ assumes the whole matter to be settled law, for he says, that it might have been replied that "though the plaintiffs did give time, they gave it with certain reservations, which prevented the discharge from taking effect." In *Thomas v. Courtney*⁴ the doctrine had been carried much further, for a creditor who signed a composition deed was held not bound to

give up the money which he received on a security

* 1012 * previously placed in his hands, the deed containing no stipulation to give up securities, and the effect of it not being to extinguish the original debt. *Hall v. Hutchons*⁵ is to the same effect; so is *Solly v. Forbes*.⁶ And Lord St. Leonards, in *Wyke v. Rogers*,⁷ summing up the result of all these authorities, said: "All the cases prove that where an instrument is taken which might otherwise operate as a discharge of the surety, there will be no discharge if the remedies against the surety are preserved." The bond here was not taken in satisfaction, and therefore did not operate in extinguishment; *Ex parte Hodgkinson*.⁸

What are the securities given in this case? They are promissory notes, which do not in form constitute the execution, by a married woman, of her power of appointment over separate estate, but on which it is nevertheless liable as incident to her power of dealing with her separate property: *Owens v. Dickenson*,⁹ *Field v. Sowle*,¹⁰ *Murray v. Barlee*,¹¹ which last carried the rule much further than had before been done, for there the separate estate of a married woman was held liable to the payment of the bill of a solicitor whom she had employed; and the Lord Chancellor intimated an opinion that the separate estate of a feme covert was

¹ 4 M. & W. 454.

⁷ 1 De G., M. & G. 408.

² 1 De G., M. & G. 408.

⁸ 19 Ves. 291.

³ 4 M. & W. 465.

⁹ Craig & Ph. 48.

⁴ 1 B. & Ald. 1.

¹⁰ 4 Russ. 112.

⁵ 3 Mylne & K. 426.

¹¹ 3 Mylne & K. 209.

⁶ 2 Brod. & B. 38, 4 J. B. Moore, 448.

liable in equity to her general engagements as well upon an implied undertaking as by a written obligation. An equitable liability being established, equity will appoint a receiver : *Curling v. Townsend*,¹ *Davis v. The Duke of Marlborough*.²

* The answer here confesses equity ; it admits that notes * 1013 were given ; and that being so, they constitute an equitable mortgage, which must be satisfied out of the separate estate. The appellants are therefore entitled to the relief now prayed. The giving of promissory notes here is not denied, and the respondent declares that they were handed over to the appellants as security for advances. It is true that she says she was defrauded by her nephew ; and she charges the appellants with being cognizant of that fraud ; but that is a question to be tried ; and what the appellants now ask is, that in the mean time the property shall not be allowed to slip away, but that, in order to secure it, a receiver shall be appointed. If there is enough to show that there is equity confessed, it is sufficient for this purpose ; it is not necessary that it should be such as on the face of the answer will sustain a decree : *Bentinck v. Willink*.³

The original debt is not necessarily extinguished by the payments made in the course of subsequent dealing : *Henniker v. Wigg* ;⁴ nor by the execution of the bond, and the agreement not to take Mrs. Harris in execution. The right against Mrs. Harris is there expressly reserved, and at the desire of the surety may be enforced, and the bond is only a collateral security. That a bond may bear that character, even with reference to a less solemn instrument, is shown by the observations of Lord Eldon in the *Bank of Ireland v. Beresford*.⁵ *Eyre v. Everett*,⁶ *Twopenny v. Young*,⁷ *Holmes v. Bell*,⁸ and *Bell v. Banks*,⁹ are to the same effect. Here it is expressly so described.

The respondent here need not submit to have a receiver * appointed ; she was offered by the order of the Master of * 1014 the Rolls¹⁰ the alternative of finding a surety, but that she has not thought proper to do. The moment it is admitted that there is a doubt about the circumstances of the case, that the

¹ 19 Ves. 628; Daniel's Chanc. Prac. 1582.

² 2 Russ. 381.

³ 2 Swanst. 108–132, 137.

⁴ 3 B. & C. 208.

⁵ 2 Hare, 1–11.

⁶ 3 Man. & G. 213.

⁷ 4 Q. B. 792.

⁸ 3 Man. & G. 258.

⁹ 6 Dow, 233, 236.

¹⁰ 13 Beav. 196.

claim must be the subject of consideration, and consequently that further proceedings must take place, the right, in a case like the present, to have a receiver appointed, is established. It is admitted that fraud in the concoction of the agreement might have discharged the surety, as in the cases of *Rees v. Berrington*,¹ *Pidcock v. Bishop* ;² *Nisbet v. Smith* ;³ *Mayhew v. Crickett* ;⁴ *Samuell v. Howarth* ;⁵ *Bonser v. Cox* ;⁶ *Oakeley v. Pasheller* ;⁷ but all those cases are distinguishable from the present, for in all of them a fraud was committed, to which the creditor was a party, or the contract was not executed by the principal, or was subsequently changed in fraud of the surety, or without his knowledge, and without the remedy being reserved. The principle on which all subsequent cases have proceeded was originally laid down in *Higgens's Case*.⁸ There has been no fraud here. Though it is clear, as a general rule, that if a security of a higher nature is taken, the security of a lesser nature is merged or extinguished, it never yet has been held, where a second security has been given by one of two persons, both of whom were previously liable, and this second security is not expressed to be in satisfaction of the former, but all rights upon the former are reserved, that the former is merged or extinguished. On the contrary, in *Drake v. Mitchell*,⁹ one

* 1015 * of three covenanters gave a bill of exchange for part of a debt secured by the covenant, and a judgment recovered on the bill was held not to discharge the joint and several covenantors, who were still held liable in an action on the covenant.

The practice of conveyancers has always been in accordance with this doctrine, and the best precedents¹⁰ contain clauses expressly reserving the rights of the creditor against any sureties, or upon any securities placed in his hands for that purpose.

On all these grounds it is contended that an equitable claim has been made out against the separate estate of this respondent; that under the circumstances of this case that estate must be treated as of a perishable nature; and consequently that the appellants are entitled to have a receiver appointed.

¹ 2 Ves. Jun. 540.

⁴ Beav. 379.

² 3 B. & C. 605.

⁵ 4 Clark & F. 207.

³ 2 Brown, C. C. 579.

⁶ 6 Rep. 44 b.

⁴ 2 Swanst. 185.

⁷ 3 East, 251.

⁵ 3 Mer. 272, 278.

⁸ Bythewood, by Jarman, vol. 8, pp. 531, 544, 582, 606.

Mr. Roupell and *Mr. Elderton* for the respondent. — The appellants here, relying on what they alleged to be equity confessed in the answer, asked for a receiver before the cause was heard and a decree made. The only grounds on which a receiver was asked for, were, that the giving of these notes constituted an equitable charge on the respondent's separate property, and that she was a person of advanced age, and that therefore the property was to be treated for this purpose as perishable property.

The notes here do not operate as an appointment of the separate estate of a married woman, and *Owens v. Dickenson*,¹ and *Murray v. Barlee*,² are inapplicable to the present case. The special circumstances here * render them inapplicable. It is * 1016 said on the other side, that in a case of this kind the mere giving of promissory notes will operate as a deed of appointment made in pursuance of the power. That is the purpose for which *Murray v. Barlee* is cited, or it has no meaning whatever. But if so then these notes are valid, not only as against her, but as against her property; not only as against the income, but as against the capital of her real and personal estate; and on that ground a receiver is unnecessary.

[THE LORD CHANCELLOR. — Would that be the effect of these notes as against subsequent appointees?]

If they could be taken as a valid appointment, they would, as given for valuable consideration, be held good as against any voluntary appointees. If her estate is bound at all, it must be in consideration of the notes being treated as an appointment. [THE LORD CHANCELLOR. — That is an appointment in one sense, but not in the sense in which that word is usually employed.]

The appointment of a receiver would deprive the respondent of the benefit of every farthing of her property. She has no power of present disposition over the principal, and the receiver would prevent her from receiving the interest; and yet, after her death, the Court might determine on the hearing (as indeed she now contends it must determine) that there was no claim against her estate. But, in the mean time, by the appointment of a receiver, she would have been reduced to poverty. There is no case which justifies the present proceeding; *Bentinck v. Willink*³ only shows that if there is equity confessed in a case like the present, it is a

¹ Craig & Ph. 48.

² 2 Hare, 1.

³ 3 Mylne & K. 209.

case which ought to be tried in equity, and ought not to be tried at law; but then this extreme remedy against a surety

*1017 cannot be granted before the case has been itself * decided.

The Court will not, as of course, put a receiver over the property. The bill pretends to set forth an equity; the answer denies it. The Court is not bound, because the case is in doubt between these conflicting statements, to appoint a receiver; for that is in effect to grant the prayer of the bill without argument. It is bound, for such a reason, to refuse the receiver.

As to the facts. The respondent states expressly that on the faith of the first note being paid, she gave the second: that second note was therefore obtained from her by fraud. What was afterwards done? The bill itself says: that "in the beginning of 1848, Harris & Co. required a further advance from Farley & Co.; and it was then arranged between the two firms that the two bills of exchange, for 1000*l.* and 500*l.*, should be withdrawn, and that Farley & Co. should make to Harris & Co. an immediate advance of 1000*l.* in cash, and that security for such further advance, and part of the other monies then due, should be given to Farley & Co. by Harris & Co., to the extent of 3000*l.*" This bill, therefore, was required not to meet an advance, but to cover existing liabilities. It was certainly a strange commercial transaction, and connecting it with that part of the answer¹ in which the respondent relates the giving of the note for 800*l.*, there can be no doubt that a gross fraud was committed upon her, and she positively denies that she ever joined in any note for 3000*l.* On these facts, therefore, there is no ground to impugn the decision of the Court below.

The dissolution of the partnership firm had the effect of putting into the hands of the bankers all the partnership property, *1018 and it was then arranged, entirely without the * knowledge of the surety, that one of the two partners should be completely discharged, at all events in respect of the debt for which the surety (if the notes were valid as against her) was liable; and a deed was executed for the purpose of carrying into effect that agreement. This was a variation of the securities, which certainly released the surety; for the debt had then become, not the debt of the two, but of one only: one of the principal debtors had been absolutely released. It is a settled principle of law, that the

¹ See ante, p. 1000.

debtor can do nothing to vary the responsibility of the surety without his knowledge, otherwise his liability is at an end. Suppose the surety had called on the bankers to sue, they must, after the execution of these deeds, have declined to do so, except against Bowers alone. It is true that the bankers are not parties to the agreement; but it was given in consequence of the deed to which they were parties; and so completely were all these arrangements kept secret from the respondent, that in her answer she expressly states that she did not know of those bills existing against her until just one month before the bankruptcy. She further alleges that the bankers knew all the facts of the case, and that they had assisted in deceiving her, by never asking for payment of any one of the notes as it fell due, nor speaking to her at any time upon the subject. Her answer, so far from confessing an equity, sets up a case of fraud, committed by Bowers, and taken advantage of (with knowledge) by the appellants.

Assuming, however, that the House should think there is in any respect equity confessed in this answer, then according to the law of principal and surety, there is no case made out to impeach the decision of the Court below. On the contrary, all the authorities show that that decision is right, and that the appellants have not any title to ask for a receiver, but that the respondent is in equity, as at law, * released. The two cases of *Nisbet* * 1019 v. *Smith*¹ and *Rees v. Berrington*² form the basis for all the rest; in the former the principle of the rule was fully discussed, and in the latter it was said, that if you changed the nature of the security, without consulting the surety, he was released. *Orme v. Young*³ decided that where the obligee in a bond gave time to the obligor, so as to prevent himself from suing such obligor for the debt, and to prevent the surety from coming into a Court of Equity for relief, the surety was discharged; and that case and *Dunn v. Slee*⁴ put the matter at law upon the same principles which would govern it in equity. In *Smith v. Winter*, Baron Parke uses expressions to a similar effect.⁵

The argument on the other side is, that the creditor may set at defiance these plain rules of law and equity, if he will but take care to introduce words which shall declare that he still holds the

¹ 2 Brown, C. C. 579.

⁴ Holt, N. P. 399.

² 2 Ves. Jun. 540.

⁵ 4 M. & W. 454-464.

³ Holt, N. P. 84.

surety liable. *Ex parte Gifford*¹ has been relied on, but does not warrant that proposition ; for that was a case, not between creditor and surety, or between the principal debtor and the surety, but between co-sureties amongst themselves. Nor can the observations of Lord Eldon in that case be construed to have such a meaning as is now contended for, or in any way to contradict *Rees v. Barrington*: nor in referring to *Richard Burke's Case*,² does he pretend to put that as a case, which shows that a principal creditor could still hold the surety liable after his discharge of the principal debtor. The various instances³ in which Lord Eldon mentioned

Richard Burke's Case show that the impressions which
* 1020. that case left on * his mind were not the same at all periods.

Nor were those impressions consistent with each other, or with the only report now known of the case itself. In none of the instances where the case was so mentioned was the reference to it given, but a report of it has been traced out by the reporter to this House.⁴ In that report Edmund and Richard Burke appear to have entered into four bonds to Hargrave, a creditor of their relative W. Burke, for the sum of 1050*l.*, and to have taken from Hargrave a counter bond for securing the like sum. Hargrave borrowed on his own promissory note 100*l.* from Cator, and deposited one of these bonds as a collateral security. Cator filed a bill to have his 100*l.* repaid out of the bond, and sought to prevent

¹ 6 Ves. 805.

² See post, p. 1020.

³ 2 Bos. & P. 62; 6 Ves. 809; 18 Ves. 22, 26; Buck's Cas. in Bank. 520; 6 Dow, 238.

⁴ Nom. Cator *v. Burke*, 1 Brown, C. C. 434. The bill and the answers of the two Burkes and of Hargrave justify the report. The Burkes state, that in June, 1777, W. Burke went to India; that in September, 1777, Hargrave told them that he had accepted bills of exchange on account of William Burke for 1000*l.* and upwards, on which he had been left liable, and asked them for a bond to satisfy the holders of these acceptances; that they, out of regard to W. Burke, and to save Hargrave, executed four several bonds, for 1050*l.* in the whole, and that Hargrave executed a counter bond for the same sum; that they executed said bonds without value; that in May, 1778, W. Burke returned from India, and paid the debt, and demanded the bonds to be delivered up, but that Hargrave from time to time excused himself, till, through insolvency, he absconded. They submitted that, under the circumstances, they were entitled to their equitable defences against these bonds. Hargrave, in his answer, did not deny the above statements, except that he alleged he was still under liability to the amount of 1500 guineas for W. Burke, and therefore he desired that Cator should be satisfied out of the bond.

the Burkes, in any action he might bring on their bond, from setting up the counter bond of Hargrave. Lord Loughborough and the other Commissioners of the Great Seal refused to treat the bond as an assignable bond, and, dismissing the bill, left Cator to his action at * law. The case was reheard * 1021 before Lord Thurlow, who expressed an opinion that a special purpose appearing for the bond to Hargrave, and that it was not to give a general credit, held, that the plaintiff was not entitled to the remedy prayed, and therefore affirmed the order for dismissal. This report does not by any means justify the mode of applying the case¹ in *Boultbee v. Stubbs*, where Lord Eldon seems to give two versions of *Burke's Case*, neither of which is strictly correct, according to the report; but either of them, properly considered, shows that he did not think the surety still remained liable. And such, in fact, was his decision there.

The cases at law do not establish the principle now contended for. In *Nichols v. Norris*,² what Lord Tenterden said was mere matter of reasoning on legal policy, and the point of the judgment was, that there was no suretyship. The circumstances in *Harrison v. Courtauld*³ are entirely unlike the present, and on them the case was decided. In like manner, in *Fentum v. Pocock*⁴ the decision proceeded on the ground that both the parties were principals, and that there was no suretyship. In *Thomas v. Courtney*,⁵ on which Mr. Justice Patteson founded his judgment in *Nichols v. Norris*, the whole case was put on the intention of the parties. In *Kearsley v. Cole*⁶ the particular point involved here did not arise; for the surety there had given his consent to the deed. In *Nicholson v. Revill*⁷ the Court of King's Bench expressly acted on the principle laid down in *Cheetham v. Ward*,⁸ "that the debtee's discharge of one joint and several debtor is a * discharge of all." *North v. Wakefield*⁹ does not affect * 1022 this case, for there it was said that the deed did not operate as a release.

The authorities to show that the surety is discharged are clear

¹ 18 Ves. 20.

² 16 M. & W. 128.

³ 3 B. & Ad. 41, note.

⁴ 4 A. & E. 675.

⁵ 3 B. & Ad. 36.

⁶ 1 Bos. & P. 630.

⁷ 5 Taunt. 192.

⁸ 13 Q. B. 536.

⁹ 1 B. & Ald. 1.

and uniform, and cannot be distinguished from the present case. This very question of reservation of right against the surety was raised in *Bowmaker v. Moore*.¹ There a motion was made that the defendant might be restrained from proceeding in an action at law against the surety in a replevin bond. There were disputes about the terms of the holding, and other matters; and after the bond had been executed there was an agreement between the landlord and the tenant to refer to arbitration, and the tenant was to be allowed to deduct what was paid; but nothing was to prejudice the distress, or to discharge the sureties in the replevin, and pending such reference no proceeding was to be taken in the action of replevin. The Court held, that when the agreement of reference was executed, the surety was discharged. There was no other change than the mere giving of time, and there was a reservation of the right against the surety; so that the case was in contradiction to *Ex parte Gifford*. The case came on again afterwards,² when the *Bank of Ireland v. Beresford* was quoted; and, on the ground that the agreement might have made a difference in the situation of the surety, he was held to be discharged; and the question whether the change might not be advantageous to the surety was not allowed to influence the result.

[THE LORD CHANCELLOR.—The Court there construed the agreement as an agreement that under no circumstances were *1023 there to be any proceedings on the replevin bond *pending the arbitration; therefore the surety, as a surety, could not have called on the landlord to proceed.]

And thereby his situation was altered, and consequently he was discharged. That case was decided within six years after *Boulbee v. Stubbs*. The next case is that of *Samuell v. Howarth*.³ There the contractor for goods obtained them under a security for payment given by a third person; the contractor accepted bills for payment for them without the surety's knowledge; those bills were renewed, and on that ground the surety was held to be discharged, and Lord Eldon said that the principle was the same at equity as at law, and therefore he would not send the plaintiff to law.

[THE LORD CHANCELLOR.—There is some ambiguity in that case, in the expressions as to reserving rights against the surety. The Court in the case in Price, construed the arrangement as an

¹ 3 Price, 214.

² 7 Price, 223.

³ 3 Mer. 272.

absolute suspension of proceedings against anybody; that of course could not be good; but may you not make a contract which shall be operative, so far as such a contract can be operative at all, between the two parties, and yet by leaving to the surety all his remedies, continue his liability?]

Not without his consent. Lord Eldon meant to refer to a contract that should be so plainly and distinctly expressed that nobody could doubt that the surety's rights were in no way prejudiced. Here there was not that sort of reservation. The Courts have no authority to consider whether the change is beneficial or not to the surety, but simply whether there has been a change; for he has a right to say, These were not my stipulations, and I am discharged.

[THE LORD CHANCELLOR.—In *Samuell v. Howarth*,¹ Lord *Eldon puts it not as if the mere change of the *1024 contract discharged the surety, but speaks of a change which “puts it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract.”]

The principles Lord Eldon there laid down were clearly in favour of this respondent; his other observations referred to the facts of that individual case, where the contract was operative only within a particular period, and any one could tell where the change of liability occurred. The case of the *Bank of Ireland v. Beresford*² does not support the doctrine now contended for, even on the reference made by Lord Eldon to *Boultbee v. Stubbs*;³ for in *Boultbee v. Stubbs* the decision was in favour of the surety, and yet Lord Eldon, when referring to it, plainly thought the reverse. Nor is *Mayhew v. Crickett*⁴ an authority for the appellants, for there this particular point did not arise; but the sureties were discharged by the release of the principal from the execution, and the liability of one of them was only held to be revived because he had afterwards, with knowledge of all the facts, given his promissory note to pay the amount. The original waiver of the execution against the sureties had been held to discharge the principal. *Hall v. Hutchons*⁵ is not in point, for there the decision

¹ 3 Mer. 272, 278.

⁴ 2 Swanst. 186.

² 6 Dow, 233.

⁵ 3 Mylne & K. 426.

³ 18 Ves. 20.

proceeded on an act of the surety done quite independently of the dealing between the creditor and the principal debtor.

* 1025 *Ex parte Glendinning*¹ cannot be * reconciled with *Ex parte Gifford*,² for the former expressly requires that the reservation should be on the face of the same instrument as the release, and the latter treats that as unnecessary. *Rees v. Berrington*³ contains an explanation of the law, the principle of which is, that there shall not be any dealings between the creditor and the debtor in the absence of the surety, if the surety is meant to be held liable. That principle was maintained in *Cheetham v. Ward*, and expressly affirmed in *Nicholson v. Revill*; *Boulbee v. Stubbs*, and all the other cases where the point was indirectly raised, proceed upon that principle, which is essentially one of equity and justice.

Most of the cases on this subject are collected by Mr. Purton Cooper in a note to his "Reports of some Cases" in the different Courts in Chancery,⁴ and they establish that this respondent is released.

Here the purpose of obtaining the notes was misrepresented. The statements made were untrue. The first and second notes were obtained as for future advances, but, though obtained for that purpose, they were used to secure payment of money already due. As to the last note, the giving of it is absolutely denied, and therefore, though the appellants represent it to have been given partly for the old account and partly for future advances, it is altogether out of the case. So far as the case is stated by the appellants on their own bill, the respondent was made a surety for an amount then due, and even as a surety she was defrauded, and with their knowledge.

When the deed of dissolution of partnership was executed, but not till then, the accounts were balanced. That alone exonerates the respondent from liability; for if an * account is open, every payment made before the balance is taken must go in reduction of that balance: *Clayton's Case in Devaynes v. Noble*.⁵ Then, as the appellants have fraudulently altered the

¹ *Buck's Bankruptcy Cases*, 517.

² 6 Ves. 805.

³ 2 Ves. Jun. 640.

⁴ For the Years 1837, 1838, p. 563; 1 Coop. Points of Prac. in Ch. 563.

⁵ 1 Mer. 585.

balance, the surety was discharged, for she was only surety for the balance.

What was the nature of the contract? The respondent was made a surety for a joint debt of the partnership, but she was made to believe that she had the security of the trade that was carried on. Instead of that belief being true, the debtor and the appellants entered into an agreement behind the back of this surety, which agreement put an end to the partnership, and Mrs. Harris, one of the partners, was discharged from any real liability to the debt. That itself was an alteration of the contract, which discharged the surety. Then comes the clause by which the liability against the surety is reserved, but that would give to the surety a remedy against only one of the principal debtors, and not against both. It may be that there is a distinction at law between a covenant not to sue and a release, but that distinction does not exist in equity. Besides, Mrs. Harris was here released. Then on what principle can the remedies against the surety be continued?

This is not perishable property, and the Court is not asked for an injunction to prevent waste of a fund to which the appellant has some unquestioned right, but is asked to appoint a receiver over the property of a person who may never be pronounced liable to pay one farthing. Such an application cannot be granted.

Mr. Rolt, in reply.—There is no reason why the case should go on to a hearing, if the argument on the other side is correct; for if * the reservation is not sufficient to keep *1027 alive the remedy, there is an end of the claim; if it is, the receiver ought to be appointed; for, in the first place, these notes do not properly constitute an execution of the power of appointment, *Owens v. Dickenson*¹ and the comment on it in Sugden on Powers;² although they are sufficient to create an equitable charge on the respondent's estate.

It is not necessary that the appellants should establish their claim before they can ask for a receiver. They are equitable mortgagees, and an equitable mortgagee under a contract is always entitled to a receiver, for by the contract he is to be considered as a legal mortgagee. The principle on which a Court of Equity will

¹ Craig & Ph. 48.

² 7th ed. vol. 1, p. 408.

appoint a receiver is stated in *Davis v. The Duke of Marlborough*.¹ It is not true that in every case in which an equitable mortgagee asks for a receiver, his application can be defeated by an allegation in the answer that fraud has been committed. Till set aside on that ground, the securities must be taken to be valid.

The only rule is, not that the creditor shall not deal with the debtor at all, but merely that he shall not deal with him so as to prejudice the surety. That has not been done here ; the creditor reserves his rights against the surety ; the consequence of which is, that the surety's rights against the debtor are reserved, and the surety is not prejudiced. *Bowmaker v. Moore*² does not apply, for there the object of the replevin bond was to prosecute the action ; whereas the private arrangement stopped the action, and directly defeated the object of the bond. So in *Samuell v. Howarth*,³ the period of credit was limited to a specified time, and the

* 1028 creditor wrongfully extended * the time. *Nicholson v. Revill*⁴ and *Hall v. Hutchons*⁵ have no relation to this case.

The opinion of Lord Eldon in *Boulbee v. Stubbs*⁶ is really in favour of the appellants ; and the point on which he always puts these cases was, whether the surety was, by the private agreement between the creditor and the debtor, deprived of his remedy against the principal. The surety was not deprived of it here, and therefore the right of the appellants against the surety still continues.

THE LORD CHANCELLOR. — This is a case of great nicety ; it was argued on two days before Lord Langdale, who took some time to consider his judgment, and then determined to grant the application for a receiver. It was afterwards brought before Lord Chancellor Truro, who likewise took time to consider it, and eventually adopted a view of the case different from that of Lord Langdale, and gave an elaborate judgment, in which he discharged the order of the Master of the Rolls. It has now come up to your Lordships' House. It is a case in which some little time is absolutely necessary for the consideration of the numerous decisions which bear upon it, and the principles on which the judgment ought to proceed, the more especially as it involves several points, every one of which requires consideration.

¹ 2 Swanst. 137, 158.

⁴ 4 A. & E. 680.

² 3 Price, 214, 7 Price, 223.

⁵ 3 Mylne & K. 426.

³ 3 Mer. 272.

⁶ 18 Ves. 20.

On one side it is contended that the existence of an equitable debt or mortgage justifies the appointment of a receiver. The first answer given to that is, that the securities which are said to constitute this equitable debt were obtained from the respondent by fraudulent means ; but it is replied that there is no evidence to prove that * allegation, or to show that the appellants were parties to any fraud, and that, under the circumstances here existing, the fact of the respondent executing the securities which constitute the equitable mortgage cannot be disputed ; that the question of her liability is decided by the reservation of the appellants' rights on all the securities in their hands, and that until a bill has been filed, and a decree obtained, to set them aside on the ground of fraud, they must be taken to be valid securities. Then, assuming that to be so, the point to be determined is, whether there are not circumstances stated which relieve her from liability on these securities.

It is admitted that there are circumstances which would afford the respondent relief, but for others which prevent their operation for that purpose. It is said that she is relieved by the time given by the creditor to the principal debtor, enabling him to take a period of years to pay that which he was strictly liable to pay *instanter*. It is a general principle that time given to the principal absolves the surety ; but then it is said that the operation of that principle is taken away by this circumstance, that the instrument which gave the time stipulated that that should not prejudice the rights against the surety. First of all, it is denied on the other side that such a reservation will have such an effect ; and next, it is said that there are circumstances in this case which make this exception to the general rule inapplicable. It is my duty to give my attention to all these points before advising your Lordships as to the judgment to be pronounced.

August 20.

THE LORD CHANCELLOR.— This case was heard some time since at your Lordships' bar, when the circumstances under which it came before you on appeal appeared to be these. [His Lordship here * stated the parties, their situation, and interests, and the chief allegations in the bill and answer.] * 1030 The substance of the transaction, as stated in the answer, is, that Mrs. Homan, at the instance of her nephew, joined him, in Decem-

ber, 1844, in a promissory note for 100*l.*, in order to enable him to borrow money from the bank on that security; that some time afterwards, on his representations that the note had been duly taken up and paid, she joined him in another note for 500*l.* for the same purpose; and again, on a third occasion, in a further note for 300*l.*, on a like representation that the two former notes had been duly taken up and paid. It is necessary also to bear in mind Mrs. Homan's account of an interview between herself and the plaintiff Gutch, who was accompanied by Mr. Hyde, his solicitor. She says: "That about a month previously to the time of the bankruptcy of Bowers, and, as she best recollects, on or about the 9th of July, 1849, the plaintiff Gutch, accompanied by his solicitor, Mr. Hyde, of the city of Worcester, came to the residence of defendant, at Welland, and produced various documents purporting to be bills of exchange, or promissory notes, which, as she best recollects, Mr. Hyde represented that she was liable to pay: That having called into the room Mrs. Jane Bayes, a sister of Bowers, she requested Mrs. Jane Bayes to take the particulars of said bills of exchange, or promissory notes, but that Mrs. Jane Bayes requested Mr. Hyde to take such particulars, which, as defendant believes, he did: That Mr. Hyde then, in the presence of Mrs. Jane Bayes, asked defendant what she meant to do with respect to payment of them, or to that effect, and that she, defendant, replied that she was not liable to pay them, and could not pay them, and that, in fact, Bowers owed her money, or expressed herself to that effect."

She was then asked about the bills or notes, and *1031 * denied her signature to them, and stated, "as she then

believed, and still believes, that she never joined Bowers, or any one else, in a bill of exchange for 3000*l.*, and added, that she never joined Bowers in any bill of exchange, but for a small amount; and that Bowers had always told her that they had been taken up, or expressed himself to that effect; and defendant added, as the fact was, that Bowers owed her money, and that the bankers were aware of it; and that she had asked him some time since for better security than she held, and that he had told her that he was about purchasing the premises in the Corn Market, and that she should have the deeds, or made some statement to that effect, and that the plaintiff Gutch remarked that he and his copartners had had those deeds for the last five years, or to that effect: That said plaintiff afterwards asked defendant what was to be

done with respect to the bills of exchange, or promissory notes, and that Mrs. Jane Bayes replied he must take them to Worcester, and make those pay who had the money from him and his co-partner, for defendant had nothing to do with it, or expressed herself to such or the like effect, and that plaintiff Gutch replied that they could not do that, for they (meaning Mary Ann Harris and John Bowers) owed them more than that on another account, or expressed himself to that effect; and also said, to justify himself and his partner for having trusted Harris & Bowers, that it was the best ready-money account in Worcester; that they turned from 70,000*l.* to 80,000*l.* a year, and that their (appellants') managing clerk had, in or about January, 1849, been engaged for three days and nights in investigating the affairs of the firm of Harris, Bowers, & Co., and that they were then worth 11,000*l.*, or expressed himself to such or the like effect."

The plaintiffs moved for the appointment of a receiver, * which was granted by Lord Langdale, whose order was * 1032 reversed by Lord Truro, and the case has now come by way of appeal to your Lordships. The question to be decided is, whether this House ought to reverse Lord Truro's order.

The receiver, if appointed in this case, must be appointed on the principle on which the Court of Chancery acts, of preserving property pending the litigation which is to decide the right of the litigant parties. In such cases the Court must of necessity exercise a discretion as to whether it will or will not take possession of the property by its officer. No positive unvarying rule can be laid down as to whether the Court will or will not interfere by this kind of *interim* protection of the property. Where indeed the property is as it were *in medio*, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. Such is the case when a receiver of a property of a deceased person is appointed pending a litigation in the Ecclesiastical Court as to the right of probate or administration. No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the

plaintiff may be doing a wrong to the defendant ; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may by its *interim* interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no * 1033 adequate compensation. * In all cases, therefore, where the Court interferes by appointing a receiver of property in the possession of the defendant before the title of the defendant is established by decree, it exercises a discretion to be governed by all the circumstances of the case.

When the evidence on which the Court is to act (here the only evidence is the answer of Mrs. Homan) is very clear in favour of the plaintiff, then the risk of eventual injury to the defendant is very small, and the Court does not hesitate to interfere. Where there is more of doubt, there is of course more of difficulty ; the question is one of degree, as to which, therefore, it is impossible to lay down any precise and unvarying rule. In this case Lord Truro did not think the title of the plaintiff was so clearly made out as to justify the Court in turning the defendant out of possession before the plaintiffs had finally established their right, and I am not prepared to say that the conclusion at which he arrived was wrong ; on the contrary, I think it was right.

There is no doubt upon the face of this answer, the only evidence on which the Court can here act, that the defendant was induced to sign the notes in question on representations, made to her by Bowers, altogether false. She states her belief that the bankers, now represented by the plaintiffs, were cognizant of all the representations so made to her. I do not place much reliance on the fact that she states this to be her belief, because no doubt it is to be treated merely as the inference which she draws from the facts stated in the answer, and not as a belief grounded on other matters known to herself alone. But the question is, whether the facts stated do not fairly warrant such a belief.

The case of the plaintiffs is one full of suspicion. The defendant was an old lady of the age of seventy-five at the date * 1034 of the earliest transaction in December, 1844. She * had married a second husband in 1836, when she was sixty-six or sixty-seven years of age, and in March, 1850, when she put in her answer, she had been for some years living apart from this husband. Her memory had been impaired by reason of a serious

accident in the summer of 1843, and she had been placed in some difficulty by the absconding of two solicitors whom she had successively employed to manage her property.

It is impossible not to believe that the bankers must have known what were the circumstances of the defendant. Though she did not (so far as it appears) keep an account with them, yet she had on more than one occasion called at the bank, and their managing clerk frequently visited at her house at Welland, and so appears to have been on terms of intimacy with her, Welland being near Upton, one stage from Worcester. The bankers before they acted on the faith of defendant's security must have made inquiries and ascertained, if they did not previously know it, that the defendant was an infirm old lady, not having (so far as it appears) any one near her to protect or advise her on matters of business. She was a married woman, and they must therefore have satisfied themselves that she had separate property, otherwise they would have known that her promissory note was mere waste paper. They could not but have known that Bowers, at the date of the several notes, was pressed for money, in fact within less than a year after the date of the last note he had become hopelessly insolvent. They could hardly have supposed that the defendant knew the state of her nephew's affairs; in other words, they must have suspected that he deceived her in order to get her to give securities which would enable them to strip her of all her property for her life, unless (which they must have known was highly improbable) Bowers himself should be able to pay his debts.

Without saying that in every case a creditor is bound * to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. If a person abstains from inquiry because he sees that the result of inquiry will probably be to show that a transaction in which he is engaging is tainted with fraud, his want of knowledge of the fraud will afford no excuse. Now, here, not only were the circumstances such (I take them of course solely

from the answer) as made the inquiry natural, but they were such as made abstaining from the inquiry unnatural. The two intermediate securities stated in the bill were acceptances by the defendant at three months, and yet the bankers never applied to her at the end of the three months when the bills became due; they held one of them for above a year and a quarter after it was due, and eventually, without any communication with Mrs. Homan, took from Bowers a new promissory note by way of substitution; so that I confess the belief to which the defendant pledges her oath, that the bankers were aware of the representations made by Bowers to the defendant, seems to me to rest on very solid foundation.

In these circumstances, then, is it reasonable for the Court to put the defendant out of possession of her property during the progress of the cause, and while the plaintiffs are establishing their title? I cannot think that such a course would be fair and proper. The probabilities are so great that the defendant was

imposed upon, that this might and ought to have been
*1036 known to the plaintiffs; * and the evil to the defendant, which must be the result of taking from her, at eighty years of age, the enjoyment of all her property, in the chance that the plaintiffs may eventually make out a claim against her, is so severe that I cannot think it reasonable to deprive her of her property till the title of the plaintiffs is established by decree.

The plaintiffs here do not claim as specific appointees of any part of the defendant's separate estate. They are merely in the nature of general creditors seeking to obtain payment by a sort of equitable action of assumpsit or debt. In such a case it is a strong exercise of authority to deprive the defendant, on motion, of property on which the plaintiffs have no specific claim, in order that, if they establish their claim as creditors, there may be assets wherewith to satisfy them. I do not mean to say that such a course may not be taken, though I have not discovered any authority for it. Perhaps the anomalous nature of the right, where a plaintiff is claiming as a general creditor of a married woman, and is seeking payment out of her separate estate, and the inability of the Court to govern the proceedings in equity in such a case by rules strictly conformable to those which regulate an action at law, may warrant the *interim* interference by a receiver.

But a chance of doing a wrong to the defendant in such case is certainly much greater, and much more apparent, than where a right asserted is a right against some specific fund or estate.

I may add, that in all cases where the Court summarily interferes on motion against the legal title, or the possession of the defendant, it has a right to expect the plaintiffs to proceed with the most complete and honest diligence to obtain a decree. Now here no step whatever has been taken by the plaintiffs ; they are still as far as ever from a decree, though more than three years have elapsed since * the answer. I do not refer * 1037 to this as a ground on which alone it would be safe to act ; but in a matter which is necessarily one of discretion for the Judge, it is a circumstance not without its weight, tending as it does to the inference that the plaintiffs relied on the immediate pressure of a receiver, rather than on their chance of final success.

For these reasons, I think that Lord Truro was right in discharging the order. I am aware that the grounds on which my opinion rests are not those, or not exclusively or mainly those, on which Lord Truro relied ; he did, indeed, refer to them ; but, obviously, the main ground of the judgment now under appeal was, that a creditor who has given time to his principal debtor cannot effectually reserve his right against the surety, or, at all events, that the nature of the deeds and transactions in this case prevented the plaintiffs from doing so. The view which I have taken of the facts here makes it unnecessary for me to go into this question ; but I should be doing wrong if I did not state, with all deference to the very able Judge whose decision is now under review, that I cannot participate in his doubts so far as relates to this general question. It may possibly be that here the giving of the bond, and the very special nature of the arrangement, may have created difficulties which have the effect of taking this case out of the general rule. On that point I give no opinion. But that a general rule exists, such as is contended for by the plaintiffs, I should, but for the high authority of the judgment now under appeal, have thought to be a matter beyond doubt ; I should have thought on principle as well as on authority, that it must be competent to a creditor to contract with his principal debtor to give him time, so far as he can lawfully and effectually do so without prejudicing his right against the surety. If he may do this by

* 1038 a contract in these express terms, the question * in every case must be whether the contract, however worded, has not that meaning. I must, therefore, guard myself against being thought to acquiesce in the opinion that such a reservation against the sureties is not effectual.

My judgment, however, in this case rests on different grounds, to which I shall not again trouble your Lordships by referring; and I need hardly add that the facts at the hearing may turn out to be quite different from those which the answer represents. But in the mean time, I think it would be unjust, under the circumstances, as set forth upon this answer, to take any *interim* step against the property of the defendant. The course which I recommend your Lordships to take is, to dismiss the appeal, making the respondent's costs of the appeal costs in the cause.

*Order appealed from affirmed, and appeal dismissed accordingly.
The Respondent's costs of appeal to be costs in the cause.*

Lords' Journals, 20 August, 1853.

1854. February 9.

ROBERT HEDGES MAUNSELL and ELIZABETH DOR-
OTHEA, his wife, } Appellants.
ROBERT HEDGES EYRE WHITE, and others, Respondents.

Marriage. Expectation of Property. Promise to make a Settlement.

On a treaty respecting the marriage of H. M., who was believed to have considerable expectations from his uncle, H. E., the guardians of the lady desired a settlement; and H. M. addressed a letter to H. E., who answered, "I have made my will, and left you my property in the county of T., which is very considerable." The guardians still refused their consent, "until a suitable settlement shall be made by Mr. H. E. of real estate upon the marriage, in the usual course of settlement, and until the sum of 10,000*l.* shall be secured to the trustees of the estate" of the father of the lady, from whom H. M. had some time before borrowed that money, in order to become a partner in a bank. The resolution of the trustees was communicated to H. E., who, in September, 1815, wrote: "My sentiments respecting you continue unalterable; however, I

shall never settle part of my property out of my power while I exist; my will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled any thing on any of my nephews, and I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made." This answer was, at the desire of H. E., communicated to the guardians, who, in March, 1816, consented to the proposed marriage, which accordingly took place in July of that year. A settlement was then drawn up, in which it was recited, that "H. M. has reason to expect that he will, upon the decease of H. E., become entitled, by virtue of the will of H. E., to a certain portion of his estate and property, pursuant to the declaration of H. E., contained in his letter to H. M. of September, 1815." H. E. was made one of the trustees of the settlement, and, about twelve months afterwards, he executed the deed; but there was no evidence that he knew any thing of its contents beyond the fact that he was named as one of the trustees. H. E. afterwards devised his property to other persons:—

Held, affirming the decision of the Court below, that H. M. could not maintain a suit to compel the trustees under the will of H. E. to convey the Tipperary estate to him, for that H. E.'s letters did not amount to a contract to settle it on him.¹

* THE appellants instituted a suit in the Court of Chancery in Ireland, for the purpose of having certain estates in the county of Tipperary, the property of the late Robert Hedges Eyre, conveyed to the uses of the settlement made on their marriage. *1040

Mr. Eyre was a bachelor, and had no surviving brother, but he had two sisters, one of whom had married the father of the present Earl of Bantry, and the other had married George Maunsell, Esq. The appellant was one of the children of Mr. George Maunsell, and had been in the army, had quitted it, and in September, 1814, became a partner in a bank at Limerick. The chief partner had, nearly up to that time, been a Mr. Thomas Maunsell (an uncle of the male appellant), who had lent the appellant the sum of 10,000*l.*, which (with some other money) the appellant had paid in as his share in the capital in the bank, and to secure the repayment of which, he gave a bond to his uncle. The different members of the family had settled among themselves how the property of the bachelor uncle (which was very considerable) was to be divided, and the appellant was considered to be likely to obtain possession of certain estates in the county of Tipperary.

¹ Jorden v. Money, 5 H. L. Cas. 202. See Caton v. Caton, Law Rep. 2 H. L. 127, 135.

The other appellant, Elizabeth Dorothea Maunsell, was then a minor under the age of sixteen. She was the daughter of Thomas Maunsell (then recently deceased), and was entitled, under the will of her father, to a moiety of his estates, which were of considerable value, and under the control of four guardians, who were her mother Dorothea Grace Maunsell, her uncle Robert Maunsell, and William Gabbett and Francis Gore. The appellant, her cousin, Robert Hedges Maunsell, made her an offer of marriage.

Some correspondence took place between the appellant and Mr. Eyre relative to the condition in life of the *1041 *former, and to his project of marriage. The appellant wanted Mr. Eyre's assistance, in order to be able to make a settlement which should be satisfactory to the guardians of the young lady. On the letters written by Mr. Eyre the appellant's claim was founded. On the 19th September, 1814, Mr. Eyre wrote: "I should wish much to pay my respects to your good aunt and her fair daughters, which I intend doing as soon as possible. I am anxious to know the person you are so much interested about. I sincerely hope to see you both happy, which, from my knowledge of you and her character, admits of little doubt. I have made my will, and left you my property in the county of Tipperary, which is very considerable; Richard knows the situation of it."

Again, on the 27th October, 1814, Mr. Eyre wrote: "My sentiments continue unalterable respecting your banking speculations; I am sincerely sorry that you ever embarked in them; you are now committed, and must get out of the scrape as well as you can. There cannot be a stronger proof of your aunt's and fair cousin's esteem for you than their sentiments expressed on the late unpleasant business. I sincerely hope that nothing may occur to prevent so desirable a union; it is incumbent on you to pay them every attention."

On the 9th December, 1814, Mr. Eyre wrote: "I do, I have, and ever shall disapprove of your being concerned in banking business; therefore be assured that I did not go security by way of any encouragement to you to persevere in that line; however, I wish every success to your new firm. I think you stand every chance of being very happy in the matrimonial way, should you be united to the young lady you mention. The education she has

received in my mind is more likely to make her a good wife and an agreeable companion, than if she had been more in the world; a year and a half is a great while to * wait, and *1042 many changes may take place before then; be not too sanguine, lest something may interfere to disappoint your wishes."

On the 17th of August, 1815, Mr. Eyre wrote: "I am not at all surprised at what you tell me respecting your uncle Maunsell [Robert Maunsell, one of the guardians]; he has acted in the most unkind and selfish manner; he cannot have the interest of the young lady at heart; he must have some one of his own children in view to possess her property, without being interested for her good qualities. If the young lady and her mother feel disposed to make you happy, I do not see how he can prevent it; he cannot have any objection to you, and as for her property, I hope that you will hereafter be fully entitled to it." These letters (together with others of a similar kind) were regularly communicated to the guardians, who held various meetings on the subject of the proposed marriage.

On the 30th August, 1815, the two guardians, Gabbett and Gore, signed a memorandum in the following words: "At a meeting this day, we think it right to state to Mrs. Maunsell that, under all the circumstances, our opinion is, that until Miss Maunsell attains the age of seventeen years, and until a suitable settlement shall be then made by Mr. Hedges [Eyre] of real estate upon the marriage in the usual course of settlement, and until the sum of 10,000*l.* shall be secured to the trustees of the estate named in the late Mr. Maunsell's will, being the sum lent to Mr. Robert Hedges Maunsell on his bond, dated 1st July, 1814, it would not be advisable that a marriage should take place; and unless Miss Maunsell shall, on her attaining the age of seventeen, retain the same sentiments respecting Mr. Robert Hedges Maunsell as she now does, we think no union ought to take place." Robert Maunsell, the other guardian, at the foot thereof wrote and signed a memorandum in the following words: "Having given an opinion *on the subject, in writing, to Mrs. Maunsell that eighteen *1043 should be the age for marriage, I now accede to the age of seventeen, as it appears to be the particular wish of Mrs. Maunsell, provided the 10,000*l.* lent to Robert Hedges Maunsell is well secured to the satisfaction of the trustees, Robert Maunsell and William Gabbett, as also that a proper settlement shall be

made for Miss Elizabeth Dorothea Maunsell before the marriage takes place."

The appellant hereupon again applied to Mr. Eyre, who, on the 4th September, 1815, wrote a letter in the following words, viz.: " My dear Robert,— My sentiments respecting you continue unalterable; however, I shall never settle any part of my property out of my power, so long as I exist; my will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled any thing on any of my nephews, and I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made. Be assured that nothing would give me more pleasure than to hear of your union with the object of your fondest wishes, and I should be concerned that the resolution I have made should retard your happiness; however, I hope you will give me credit in believing that I am only actuated by the motive I before mentioned,— that of avoiding all jealousy that the rest of my family might feel had I complied with the wishes of the young lady's guardians. I will thank you to communicate the subject of this letter in answer to one I have received from them. In all matters of this sort every thing should be carried on in the most candid and explicit manner."

On the 26th March, 1816, Mrs. Maunsell, William Gab-

* 1044 bett, and Frances Gore signed a memorandum in the * following words: " At a meeting of the guardians of Miss Elizabeth Maunsell, held this day, we, the undernamed, having reconsidered the circumstances relative to the proposed union between Mr. Robert Hedges Maunsell and Miss Elizabeth Maunsell, and finding that Miss Maunsell's attachment to him continues permanent, and that her affections are strongly engaged, and that she is on the point shortly of attaining her age of seventeen years, hereby signify and declare our consent to the proposed union taking place on her attaining her age of seventeen years, we at the same time finding that Mr. Robert Hedges [Eyre], uncle to the said Robert, has declined making any immediate settlement upon him, although it appears from the letter of Mr. Robert Hedges, that he has devised a considerable real estate to his said nephew by will, and that the said Mr. Hedges has expressed sentiments of strong affection to-

wards his nephew. We also declare that we deem it necessary that, previous to the proposed union taking place, Miss Maunsell's fortune should be settled in such a manner upon her and her issue as to preclude the possibility of her fortune being in any way affected by any contingency, or embarrassment, or failure that may hereafter occur to the bank in which the said Robert Hedges Maunsell is now engaged at Limerick as a partner." And Robert Maunsell, at the foot thercof, wrote and signed a memorandum in the following words: "I consider the question now agreed on by the majority should not have been decided on, unless a security shall be passed for the 10,000*l.* lent to Robert Hedges Maunsell, as agreed upon by the guardians, 30th September, last year, and that security to be null and void, in case the Lord Chancellor shall declare the said Robert Hedges Maunsell is entitled to the 10,000*l.*, and order the bond to be delivered up to him."

On the 9th April, 1816, Mr. Eyre wrote to the appellant: "You must have been surprised at my not having *an- *1045 swered your letter long since. I can assure you that nothing but extreme bad health could have prevented my writing to you, to say how happy I am to hear that all matters have terminated to your satisfaction. I cannot account for Mr. Robert Maunsell's conduct; he could only be actuated by self-interest, as your future prospects fully entitle you to every consideration. If I find myself strong in a few weeks, it is my intention to pay you a visit; and I long much to see my intended niece, and I sincerely hope you may both experience every happiness."

The appellant applied to Mr. Eyre to become one of the trustees of the settlement to be made upon the marriage; and on the 3d June, 1816, Mr. Eyre wrote to the appellant as follows: "You may be assured that nothing could give me greater pleasure than to comply with any wish of yours, and will act as a trustee in the instance you mention. I am glad that this event is so near a conclusion. I sincerely wish you both every happiness. I have been delayed here longer than I intended or wished; however, I hope in a few days to be able to set off on my travels. If I can do any thing for the ladies at Plassy, command me. You will make my best wishes to them."

The settlement upon the intended marriage bore date the 16th July, 1816, and was expressed to be made between the appellant R. H. Maunsell, of the first part, Dorothea Grace Maunsell and Eliza-

beth D. Maunsell of the second part, William Gabbett and Francis Gore of the third part, Richard Maunsell and Joseph Gabbett of the fourth part, and Robert Hedges Eyre and Francis Gore of the fifth part. The property of the appellant Elizabeth D. Maunsell was settled by it strictly upon trust as to real estate, and the settlement contained a recital in the following words : " And whereas the said Robert Hedges Maunsell has reason to expect that he will,

upon the decease of Robert Hedges Eyre, Esquire, his
* 1046 uncle, become entitled * by virtue of the will of his said

uncle to a certain portion of his estate and property, pursuant to the declaration of the said Robert Hedges Eyre, contained in his letter to the said Robert Hedges Maunsell, bearing date the 4th day of September, 1815." And it also contained a covenant on the part of the appellant, that " such estate and property, real and personal, as he should become entitled to by deed, will, or devise, of and from the said Robert Hedges Eyre, should, so far as the appellant Robert Hedges Maunsell should have such estate or interest therein, or power in respect thereto, as should enable or authorise him to make the limitations thereinafter set forth, stand limited in trust " ; and then certain trusts for the intended wife were set out.

The settlement was executed at that time by all the parties thereto, except Mr. Eyre. The marriage took place on the 20th July, 1816. Mr. Eyre was not called upon to execute the settlement till long after the marriage ; and when asked to do so, did it at once ; but there was no evidence to show that it was read over to him.

In 1819 Mr. Eyre's confidential adviser died ; and Mr. Eyre consulted the appellant in the management of his affairs, and was induced, by the advice of the appellant, and contrary to his own sentiments, to become one of several sureties in a deed and a bond, dated the 25th January, 1821, in the penal sum of 18,000*l.*, to Charles Hollier and Henry Dawson, for securing payment of an annuity of 1800*l.*, granted by one Marcus Blake Lynch to Hollier and Dawson, and also in a warrant of attorney to confess judgment for further securing the said annuity. He was afterwards compelled to pay a large sum of money on account of this transaction.¹ In consequence of the loss thereby occasioned to him, Mr. Eyre broke off all connection with the appellant ; but he after-

¹ See *Hollier v. Eyre*, 9 Clark & F. 1.

wards suffered * pecuniary losses from other matters, in * 1047 which, by the advice of the appellant, he had become engaged. Mr. Eyre, by a will, dated in 1829, devised his estates to other persons, altogether excluding the appellant from any benefit under it.

In 1831, the appellant was examined as a witness in a cause of *Fitton v. Eyre*, and in his depositions made a statement which implied that he claimed an interest in the Tipperary estates of Mr. Eyre. In consequence of this statement appearing in the depositions, Mr. Payne, the then agent of Mr. Eyre, wrote to request an explanation. The appellant then stated what had occurred on the occasion of the negotiations for his marriage as that which gave him an interest in the Tipperary estates. After some delay, copies of the documents on which the claim was founded were forwarded to Mr. Payne, and in 1834 Mr. Eyre caused a case, with the correspondence, to be prepared to take the opinion of Mr. Saurin, as to the effect of these letters, and the circumstances connected with them. Mr. Saurin gave his opinion that no claim could be sustained against the assignees or devisees of Mr. Eyre, but that he had full power to dispose of his Tipperary estates, and that opinion was, in 1835, communicated to the appellant. In February, 1833, Mr. Eyre executed another will, to which, in February and November, 1837, and in April, 1838, he added codicils. In September, 1838, he made his last will, to which, in January, February, and May, 1840, he added codicils, but in no one of these various documents did he make any devise or bequest in favour of either of the appellants, or of the issue of their marriage. Mr. Eyre died in June, 1840.

In August, 1841, the appellants filed their bill in the Court of Chancery in Ireland, setting forth the facts of the negotiations respecting their marriage, and the letters of Mr. Eyre written thereupon, and alleging that the Tipperary estates * were * 1048 bound by such letters, which constituted a contract or engagement entered into by the said Robert Hedges Eyre, and by the trusts declared in the marriage settlement, and that Eyre had no power otherwise to dispose of the said estates, and charging that the promise or undertaking contained in the letter of the 4th of September, 1815, was irrevocable, and that the object of Eyre in introducing the words, "unless some unforeseen occurrence should take place," was to provide against any thing which might

incapacitate him from performing the said undertaking ; and the bill prayed that the appellants might be declared entitled to a conveyance of the said estates, and for an account and a receiver, and for general relief. The respondents (who were the trustees and devisees of Mr. Eyre) put in their answers, to which a replication was filed. Evidence was taken, and the cause came on for hearing before Sir E. Sugden, the Lord Chancellor of Ireland, on the 1st and 2d of July, 1844, when his Lordship dismissed the bill, with costs (7 Ir. Eq. Rep. 413). This appeal was then brought.

The Solicitor-General (Sir R. Bethell) and Mr. Glasse for the appellants. — The letter of the 4th September, 1815, if not an actual contract, was an engagement binding on Mr. Eyre. It was a representation by him of what he had done, and the words of it were calculated, and must therefore be taken to have been intended, to produce a certain effect. Such a representation must be construed not “*secundum modum loquentis*,” but “*recipientis*.” Here it was intended to inspire confidence in third persons, and to induce them to act upon it. If it contains any statement of present intention, or any representation of past facts, still more if both these circumstances are involved in it, and they were calculated to produce and did produce a particular line of

*1049 * conduct on the part of those to whom the representation was addressed, it becomes an engagement which cannot be revoked : it did so here. The guardians acted on the letter, and gave their consent to the marriage. The letter was regarded by all concerned as a promise ; as a promise it was introduced into the settlement, and the marriage took place in consequence of it. Words of this kind would be of great force under any circumstances, but become doubly strong when made in contemplation of marriage, and with a view to marriage. Even a declaration of intention then becomes obligatory, by reason of the persons to whom it is made acting upon it, and acting upon it with the knowledge and assent of the person who made it : *Wankford v. Fotherley*.¹ In *Luders v. Anstey*,² where a marriage had taken place immediately upon such a letter, it was held that a distinct and positive dissent would be

¹ 2 Vern. 322, better reported, Freem. Ch. 200, nom. Wanchford *v. Fotherley*. See also *Moore v. Hart*, 1 Vern. 110, 201.

² 4 Ves. 501.

necessary to prevent the effect of the letter. That is a very strong case. That which was before only a proposal became, by virtue of the marriage, an agreement. The case of *Hammersley v. De Biel*¹ applied, under circumstances very strongly resembling those of the present case, the principle of these previous decisions. There the agent for the father, and not the father himself, wrote, that the father "intends to leave a further sum of 10,000*l.*" The marriage took place, and the executors of the father were compelled to pay the 10,000*l.* The decision of the Master of the Rolls was taken by appeal before Lord Cottenham, who affirmed it, stating, in the course of his judgment,² the rule of equity to be this: "A representation made by one party for the purpose of influencing the *conduct of the other party, and *1050 acted on by him, will, in general, be sufficient to entitle him to the assistance of this Court, for the purpose of realizing such representation." That case was afterwards brought to this House, and the judgment of the Court below was affirmed.³ Lord Chancellor Lyndhurst there expressed the rule applicable to all these cases:⁴ "If a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he is not disappointed, and will give effect to the proposal. This is stated as part of the arrangement; it is stated as the proposal." These expressions exactly apply to the present case. If a party says, "I intend by my will," the words are a substitute for "I engage," "I agree"; they are not a mere representation of the present state of mind of the party; they are an undertaking. But here the case is stronger; for it was not a promise to leave the Tipperary estates, but a declaration that the will had been made in favour of the appellant giving him those estates; and that it would not be altered, for that it was the intention of the uncle that the estates should come to him. The only reason given for not making them at that moment the subject of settlement, was to avoid creating the jealousy of the other members of the family. It is no objection to take words to be a contract, that if so taken they might divest the uncle of his

¹ 3 Beav. 469.² 12 Clark & F. 45.³ 12 Clark & F. 62, note.⁴ 12 Clark & F. 78.

estates ; they would not have that effect, for the contract was only to be executed through the medium of the will, and the will could only come into operation after the uncle's death. Then the writer

reserves to himself the power of altering the will, if some

* 1051 "unforeseen * occurrences should take place." But that very reservation shows that the estates had then been given, or that, with a view to the conduct of the parties, in other words, with a view to the marriage, he desired it to be so believed.

It may be admitted that, by force of these words, if he had fallen into poverty, he might have parted with the estate in order to maintain himself, but he could not do so merely from caprice, or from a change of sentiment. In the "Treatise on the Law of Real Property, as administered in the House of Lords,"¹ the case of *Hammersley v. De Biel* is commented on. The letter of the father is there treated as a positive contract, and in that respect this case will be said to differ from the present; but it could not be called a contract in the ordinary sense of that term, for it was a proceeding altogether unilateral. It was a representation on the part of the father of his intention, a representation made for the purpose of a marriage, and in consequence of which, a marriage was solemnized. It is the same here; and all the other letters of Mr. Eyre confirm the representation thus made.

[LORD ST. LEONARDS. — Was it merely a representation in *Hammersley v. De Biel*? Was it not a proposal, with a condition which, being accepted, was equivalent to a contract?]

If so, it was not a contract in the usual sense of that term, it was only an engagement by one party on which another acted ; it is so here ; this was a proposal which, being accepted, was equivalent to a contract ; and it is impossible to establish any distinction between the two cases.

Mr. Rolt and *Mr. Willcock*, for the respondents, were stopped.

* 1052 * [THE LORD CHANCELLOR. — In this case a bill was filed by the appellant for the purpose of compelling the parties claiming under the will of Mr. Robert Hedges Eyre to settle his real estates in Tipperary on the appellant, pursuant to an alleged obligation arising on certain letters written by Mr. Eyre on the occasion of

¹ Page 54.

the negotiations for the appellant's marriage. It is supposed that your Lordships are bound to come to a conclusion in favor of the appellant by reason of a decision of this House in the case of *Hammersley v. De Biel*.¹ Considering the extreme importance of treating decisions of this House on points of law as absolutely conclusive, if this case did appear to me to be governed by that of *Hammersley v. De Biel*, whether I thought that decision right or wrong, I should propose to your Lordships to come to a conclusion in conformity with it. But this case, in all its main features, is, I think, distinguishable from that of *Hammersley v. De Biel*; and if your Lordships were to reverse the decision of the Court below, you would not be acting in conformity with the prior decision, but against it; you would be forcing parties who had not only not engaged, but who had studiously and laboriously stipulated that they would never do so, into performing something which they had carefully sought to avoid, nay had stipulated that they should never be called on to perform. What are the circumstances of this case? The appellant paid his addresses to his cousin; he had an uncle, an old bachelor, with a large property; he himself had but little money; the guardians of the young lady were opposed to the marriage unless he could make a good settlement in her favour; and under these circumstances, having received kindnesses from his uncle, and believing that his uncle was * willing to befriend him, he addresses a letter * 1053 to the uncle, who says, in answer, that he is glad to see that his nephew (the appellant) is about to be well married, and that he has left his Tipperary property to the appellant. That was a very vague answer; and the trustees and guardians of the young lady wished for a more specific declaration. We have not the letter which was written to Mr. Eyre communicating to him this wish of the trustees, but we have what is more material, the answer which he made to that communication. On that answer the whole case rests. What is that answer? It is in the following terms. [See ante, p. 1043.]

The first sentence of this letter expresses the resolution of the writer: "I shall never settle any part of my property out of my power so long as I exist." Nothing can be clearer or more strongly expressed than this resolution. I think the attempt afterwards to spell out of this letter a representation which is to

¹ 12 Clark & F. 45.

be construed into an engagement or a contract, is altogether unsatisfactory. To say that in this same letter in which this sentence is to be found, the party writing it binds himself to make a settlement of his property when he merely says that the Tipperary estates will come into his nephew's possession after his death, "unless some unforeseen occurrence should take place," does seem to me to be an attempt to put a construction on words which their natural meaning will by no means warrant. Then Mr. Eyre, the uncle, says, "My will has been made for some time," a fact which we must assume to be true, and which is itself an answer to the application to make at that time a settlement in the nephew's favour. I must assume the statement to be true; there is no evidence to the contrary, and the circumstances of the case go to

show that the statement was true. Then the uncle goes

* 1054 on: "I am confident I shall never * alter it to your disadvantage; and I repeat, that my Tipperary estates will come to you at my death, unless some unforeseen occurrence should take place." What does that mean? He does not fetter himself; he says in substance, "I am now on good terms with you; I will not bind myself to do what the trustees ask; I have made my will, and that will remain as it is, unless some unforeseen occurrence should happen." This is all he says. Is or is not that a fair construction of the words of the letter thus written as an answer to an application to him to consent to make a settlement? The lady continued attached to her cousin, and the marriage, with the consent of the guardians, took place, they thinking, as they say, that the letter was equivalent to a contract by the uncle to give the nephew the Tipperary estates. I do not think that to be a legitimate inference from the letter; nor do the facts warrant the statement of the inference. That letter was written on the 4th of September, 1815. The trustees objected to the marriage; they discussed the youth of the lady, and other circumstances; and the marriage did not, in fact, take place till nearly twelve months afterwards, namely, towards the end of July in the following year.

If the parties really meant to say that they relied on this letter as a contract, I think that common honesty required that they should distinctly have brought that circumstance to the uncle's knowledge. They should have said: "What is it that you mean? is this intended as a promise which is to be binding upon you, or

is it merely an expression of kindness and good-will?" They do nothing of the sort; but after some time they proceed to make a settlement; and then what do the young man and the guardians of the young lady agree to? He covenants that he will settle this property if he gets it; and they accept that covenant. Of course all that he could do was to undertake to settle * whatever he might afterwards receive under this letter; * 1055 he did so covenant, and they took that covenant.

In *Hammersley v. De Biel* it was successfully insisted that there was a contract to leave a sum of money; but the Solicitor-General, in arguing this case at your Lordships' bar, does not go that length; his contention is, that there was a representation on which the parties acted. He has treated the rule of law as affecting representations as distinct from the rule of law which affects contracts; but still he says that where a party makes a representation, and others act upon it, such representation amounts to an engagement, and the acting upon it makes it binding as a contract. By what words are you to define whether a party has entered into an engagement as distinct from a contract, but which becomes a contract by another person acting upon it? Where a man engages to do a particular thing, he must do it; that is a contract; but where there are no direct words of contract, the question must be, what has he done? He has made a contract, or he has not; in the former case he must fulfil his contract; in the latter there is nothing that he is bound to fulfil. A representation may be so made as to constitute the ground of a contract. But is it so here? Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act on it, equity will bind him by such representation, treating it as a contract. Suppose that this gentleman had on the eve of the marriage said to the appellant: " You may safely enter into this marriage, for I have executed a deed by which I engage to leave you such and such estates." If on the faith of that representation the nephew had married, the uncle would then have made a representation on which * he knew that the * 1056 nephew would act, and it would be a fraud on the nephew, or on those who dealt with him, and came after him, to set up as an answer that that was a mere intention which he had entertained

at the time. The uncle would, in fact, have made a contract, and he would be compelled to make it good, for he would have made a representation with a view to induce others to act upon it, and on the faith of it they had, at the moment, acted. That would be a representation which, under the circumstances I have stated, would be in fact a contract. There is no middle term, no *tertium quid* between a representation so made to be effective for such a purpose and being effective for it, and a contract: they are identical. That which leads to the representation being made and acted on, determines its nature, gives it the character of a contract, or leaves it a mere representation. I must say that no such distinction as the argument for the appellants supposes, can exist in law or in principle; and though you see the word "representation" used as it is in the speech of the noble and learned Lord who decided *Hammersley v. De Biel* in the Court of Chancery, I cannot think that it was meant to bear the construction now attributed to it, and to raise any such distinction as is now relied on. That word is no part of the judgment. I must say that I do not think it is a word very happily employed. The only distinction I understand is this, that some words which would not amount to a contract in one transaction may possibly be held to do so in another. Thus in *Hammersley v. De Biel*, if Mr. Thomson had said, "I propose at this moment to pay down 10,000*l.*, and at another time if no unforeseen occurrence should take place to pay 10,000*l.* more," that would not have been a contract at all; but, when he,

being the father of the lady, went further, and wrote on
*1057 the occasion of the contract of marriage being *entered

into, "I will pay down 10,000*l.*, and further, I intend to leave her 10,000*l.* more, which sum is to be settled upon her in a particular way, and the person about to marry her is for these reasons to settle 500*l.* a year on her," and that party did make that settlement, and then married the lady: the circumstances there gave to the words used the character of a contract which equity was bound to enforce. A contract cannot be at large; it cannot be unilateral; it cannot be performed on one side, and left unperformed on the other: a Court of Equity will not allow that. Am I right in saying that that was the principle on which the Court of Chancery first, and then this House acted in *Hammersley v. De Biel*? Lord Brougham in express terms states that principle, affirming in that way what had been previously stated by the

Master of the Rolls. The noble and learned Lord¹ said : "I am clearly of opinion with the Master of the Rolls, and I concur in what he states on the subject of the words in the letter, 'subject, of course, to revision,' and which is stated by him so clearly, that I prefer his language to my own. He says most accurately:² 'Until Baron De Biel had performed his part, and prior to the marriage, the whole was to be subject to revision ; but no revision took place. The proposals and intention thus expressed remained without any alteration whatever up to the time of the marriage, and I am of opinion' (in which I entirely agree) 'that the proposal, which up to that time had been subject to revision, did then, by the acceptance of the Baron De Biel, by his due execution of the required settlement on his part, and by the solemnization of the marriage, with the approbation of Mr. Thomson, become an agreement (according to all the cases), which Mr. Thomson was bound specifically to *perform.' " That is the *1058 principle on which the case of *Hammersley v. De Biel* was decided.

The House of Lords held in that case, that though the wording of the letter was a proposal reduced into writing, the proposal to give and to intend to leave, that that really meant an agreement to this effect: "If you will settle 500*l.* a year and marry, I will give 10,000*l.* now, and 10,000*l.* by my will." If, therefore, *Hammersley v. De Biel* had been wrongly decided, which I do not even insinuate, for I do not think that it was, it did not lay down a principle which would govern this case ; for this is not a case in which the parties entered into an arrangement in the sense there spoken of, namely, an arrangement that on a given state of things happening, on certain acts being done by one party, the other would undertake to do something else ; but, on the contrary, the uncle's representation here was, that he would not bind himself to do any thing ; that, having made his will, he had by that will given to his nephew certain estates in Tipperary ; that he did not then see the least chance that he should alter his will, but still that he meant to reserve his power of doing so if any unforeseen circumstance should occur. How does such a case resemble that of *Hammersley v. De Biel*, or how does such a letter constitute a contract to do a particular thing, a contract to be enforced against the representatives of the writer of it ?

¹ 12 Clark & F. 83.

² 3 Beav. 478.

I conceive that monstrous consequences would arise from our adopting the construction now contended for. This gentleman, who cautiously insisted on reserving to himself power while he "existed," is now argued to have given up his power, and that too by the very letter in which he made the reservation. If that had been so, what would have been the consequence? He never, if

this had been a binding contract, would have had the
* 1059 power to sell * or mortgage an acre of land in Tipperary; and it was a binding contract, or it was nothing at all.

I have, my Lords, taken this short and general view of the case, because I think it depends on plain circumstances, and plain rules of construction. With respect to the earlier cases from Vernon, and Vesey, I do not think that they carry the argument any further. They show circumstances which amounted to a contract, and proceed exactly on the same principle on which this House acted in *Hammersley v. De Biel*, but none of them furnishes any authority for this appeal.

This case must be decided on the short principle that there never was any engagement whatever on the part of the uncle that he would bind himself to leave this property to the nephew. I do not know of any thing which can be construed into an engagement. There is no representation, there is no statement of any thing which was not true. All that the uncle meant was, that his present intention was to leave the property to his nephew; but he would not bind himself; he reserved the whole within his own power up to the time of his death. The Court of Equity had, therefore, no more right to make good this as an undertaking or a contract, than it would have to deal with the property of any other person who had not entered into any engagement at all. Without calling on the other side, I am of opinion that the decree of the Court below should be affirmed, and I move that it be affirmed accordingly.

LORD ST. LEONARDS.—My Lords, this is a case in which I cannot entertain any doubt whatever. It is not my intention to go into the general question of equity. I do not dispute the general principle, that what is called a representation,
* 1060 which is made as an inducement for another * to act upon it, and is followed by his acting upon it, will, especially in

such a case as marriage, be deemed to be a contract. If a party will hold out a representation as a condition on which a marriage may take place, and the marriage does take place upon it, he must give effect to that representation. But when we come to the case of *Hammersley v. De Biel*, decided in this House,¹ and we are told that we must be governed by it in the decision of the present case, we look at it, and find that there was not merely a representation of what was probable to occur, but that there was on one part a proposal, accompanied with a condition required of the other party, that that proposal was accepted, that that condition was complied with, and that there were therefore all the requisites of a binding contract. If a man makes a proposal in that manner, and it is accepted, and is followed by a marriage, though the affair may have begun by being a proposal, it has ended by becoming a contract that was binding on all the parties concerned. Here there was a simple representation. Mr. Eyre, on being applied to, represented that he had made a will; not made it with a view to the marriage, but made it long before the marriage was contemplated; such a marriage, therefore, could have no influence on a will which was already made. He made what was no doubt at the time a true representation of what he had done, and what he intended. It is argued upon as having been an inducement to the marriage. Perhaps the parties did act upon it. They trusted that a man who stood in the relation which Mr. Eyre did to the appellant would do all that he said was probable; they believed, as he did at that time, that he was not likely to alter his will. That would, of course, be a representation on which they would act. But how? Not as on an engagement made which could

* not be revoked, but as on a statement made by a relation whose affection, if it remained what it then was, would give the nephew the property in accordance with that statement. That the representation was an inducement to the marriage I am not disposed entirely to deny; but it was so only in the way I have stated. If the doctrine contended for by the appellant was true, the uncle by that representation became a mere tenant for life, without the powers of a tenant for life over his own estate. I hold it to be clear that he made no representation which could have any such effect. His will was already made, and he said it was not likely to be revoked; but

¹ 12 Clark & F. 45.

the guardians of the lady, and she herself, knew perfectly well that the uncle reserved the power of revocation. They acted on a mere representation which was all that was made. The letter of September, 1815, not only was not acted on, but it was repudiated by the guardians. That is shown by the resolution of the guardians made long after that letter was written. They said, in their resolution of the 30th August, 1815, that, under all the circumstances, the lady should wait till she was seventeen years of age, till the "usual course of settlement" could be adopted, and till the 10,000*l.* of the intended husband's property could be secured to her. They very distinctly made these two stipulations: that is plain. What was the answer to that? They instantly communicated that resolution to Mr. Eyre. We know that they did so, though we have not the letter in which they made the communication; but we know from Mr. Eyre's letter in answer, that he had received the communication from them. What was the answer to that resolution? The answer was, that he would not make any settlement whatever. He distinctly said that he would not give up his power over his property

"so long as I exist."

* 1062 letters of Mr. * Eyre which shows that any circumstances would induce him to make a settlement that would deprive him of his power over his estates. There was a clear demand made upon him for a settlement of real estate in the usual course of settlement, and for relieving the nephew from the liability to the 10,000*l.* There was as clear a refusal on his part to do either. Does he do either? There is a settlement executed, but it is a settlement of her property. Is there any settlement attempted to be made of the proposed property which he is said to have bound himself to settle? None at all. The parties did not attempt to include the estate in the settlement. What they did was, after the settlement of her property, to introduce a recital to the effect that Major Maunsell had reason to expect that some property would be left to him by his uncle; but afterwards the words, "pursuant to the declaration of Robert Hedges Eyre, contained in his letter to Robert Hedges Maunsell, bearing date the 4th of September, 1815," were improperly introduced. These words had not been there at first. When the deed came to be executed, though Mr. Eyre had consented to be a party to the trust, they left the recital as it was; and it is to be observed, that Mr. Eyre

did not execute it till twelve months afterwards. But in this recital as it stands, what do they say? Why, merely that Maunsell had reason to expect from his uncle this estate, treating his uncle as if he was not in any way a party to the deed at all. But we have been pressed with arguments to show that the uncle's refusal does not bear the meaning which the language imported; yet what else could it mean but this, "I tell you I do not intend to alter my will, but circumstances may arise to make me do so"? Now, circumstances did arise which determined him to make the alteration. What else was he to do than to act on those circumstances?

* Was he bound to go to the family, and ask their leave to * 1063 revoke his will? Certainly not; and the only reason why evidence was admitted on this point was to show that a change of circumstances had arisen, and that no fraud had been committed. These circumstances were in his own breast sufficient to justify the alteration of the will, and he was the person to decide whether they were sufficient or not. He had always had an objection to the banking business in which his nephew was engaged; he had before said, that he did not and never should approve of it; and then he had become surety for the nephew, and, as such, had been called on to pay a considerable sum of money. He was surety too in a second matter, and there likewise he was called on to pay; and the nephew had induced him to buy an estate, with a view to increase his interest in the county, and that purchase had turned out calamitous; he was a loser of thousands of pounds by the injudicious advice of his nephew, and he might well fear that if he left his property to that nephew, that property would soon be swallowed up. He thought he had good reason to alter his will. But it is said that though he did not comply with the wishes of the family, he gave the strongest reason to believe that he intended to do all that was desired, though not to do it at that time, and that he made the members of the family believe that he would allow the will to remain as it was, and would not give the property to any one else. But this is not all; another ground of setting up this claim is, that the guardians in their resolution say, that no marriage could take place till the 10,000*l.* had been assured; yet that was not done, and still the marriage did take place; so I say it is clear that the representations of the uncle did not bring about the marriage, but that his representations were perfectly

* 1064 understood in the sense in which * he made them, and in which they must be understood in a Court of justice.

The settlement was originally prepared without introducing Eyre as a party ; he never was a party, except as a trustee, and he never received the slightest notice that he was required to be more than a trustee. The mere circumstance of his being a trustee did not necessarily give him an acquaintance with the deed, so as to make him possess a knowledge of its contents ; there was no proof that it was read over to him ; but if it had been, there is nothing on the face of the deed to show that the other parties thought of it differently from what he himself did. Then, what was the covenant in the deed ? The intended husband covenanted, that whatever property, by deed, will, or otherwise, under his uncle's favour, should come to him, he would settle it on the lady ; but all this interest is put as conjectural and contingent. I am clearly of opinion, that the parties perfectly understood that the uncle rejected the proposed settlement ; that he reserved to himself full power to revoke the will he had made ; and we know that he did afterwards exercise that power of revocation. I entirely concur with my noble and learned friend, and I think the case so clear, that, in my opinion, the appeal ought to be dismissed, with costs.

Decree below affirmed ; and appeal dismissed, with costs.

Lords' Journals, 9 February, 1854.

1854. March 3, 6, 13.

JOHN SCOTT, *Appellant.*

JOHN BINDON SCOTT, *Respondent.*

Deed, Voluntary or for Value.

J. S. under his marriage settlement was seised of certain estates in the county of Clare, for life, remainder to his sons successively in tail, subject to a charge of 5000*l.* as a provision for younger children. B. S. was the eldest son of this marriage, W. S. another son, and there was a daughter, Diana. J. S. afterwards purchased other estates, one of which was called K., which in 1806 he con-

veyed by way of mortgage security to the Bishop of Elphin. In February, 1807, he executed a deed, by which, assuming to be the owner in fee of K., he conveyed it and other lands to trustees for himself for life, then to his eldest son B. S. for life, remainder to the eldest and other sons of B. S. successively in tail. This deed contained a covenant on the part of B. S. to pay J. S.'s debts, and to discharge a sum of 2000*l.* which J. S. had undertaken to pay to two children of Diana; and also an assignment by J. S. of his personal estate in favour of B. S., who was thereby appointed the attorney of J. S., with power to call in the debts due to him. The deed was registered (apparently without the knowledge of J. S. or of W. S.) upon the 1st June, 1807. On the 13th June, 1807, by a deed, to which J. S., B. S., two trustees, and W. S. were parties, J. S. granted and B. S. confirmed to the trustees the lands of K. to J. S. for life, then to W. S. for life, remainder to his first and other sons in tail, with a power to each succeeding tenant for life to charge the same with a jointure for his wife; and by the same deed W. S. gave up his share of any benefit from the provision for younger children under his father's marriage settlement or otherwise. This deed was registered a few days afterwards. J. S. died in November, 1808, and W. S. entered into possession of the lands of K. W. S. married in 1815, and B. S. was a party to his marriage settlement, in which the lands of K. were included, and by which, under the power contained in the deed of June, 1807, W. S. created a jointure for his wife. B. S. paid his father's debts, satisfied the mortgage on the lands of K., obtained a reconveyance of them to himself, and died in 1837, having allowed W. S. to remain in undisturbed possession up to that time. W. S. continued in possession and died in 1843. The son of B. S., claiming under the deed of February, 1807, brought ejectment against the son of W. S., who relied on the deed of June for his title. At a trial of this ejectment, the jury found that the deed of February, 1807, was a voluntary deed, and that that of June, 1807, was given for a valuable consideration. The Court of Queen's Bench in Ireland directed a * new trial, which took place, but the defendant did not appear, and the plaintiff obtained judgment against him by default. A bill was filed by the plaintiff in the Court of Chancery in Ireland to have the trusts of the deed of February, 1807, carried into execution, and that Court decreed accordingly.

Held, that the decree was right; that after what had occurred at law it must be assumed that the deed of February, 1807, was given for a valuable consideration, and that the deed of June, 1807, was a voluntary deed; and further that the subsequent marriage of W. S., and the circumstances attending it, did not constitute his children purchasers for value under the latter deed, which could not prevail against an earlier and a previously registered deed that had been executed for a valuable consideration.

JOHN SCOTT the elder, the grandfather of the parties to the suit, was seised of an estate for life (with remainder to his first and other sons in tail male) of certain lands at Cahiracon, in the county of Clare, under the limitations of a settlement made on his marriage with Miss Bindon, and dated in April, 1763, subject to a

charge of 5000*l.* for the younger children of the marriage, to be divided amongst them in such shares as he should by deed or will appoint. There were seven children born of this marriage, Bindon Scott (the father of the respondent), John, Nicholas, Richard (who died under age), Robert, William (the father of the appellant), and a daughter, Diana, who became the wife of Boyle Vandeleur, Esq. In the year 1800, John Scott the elder purchased for 9900*l.* the lands of Knoppogue, Masnery Lane, Crevagh, Carrorgare, and other lands in the county of Clare, and they were duly conveyed to him by an indenture dated 19th December, 1800. On the 18th March, 1806, he mortgaged all these newly purchased lands to the Bishop of Elphin, to secure repayment of a sum of 5000*l.*, with interest at six per cent., and gave a warrant of attorney as a collateral security. On the marriage of Diana

* 1067 Scott to Boyle * Vandeleur, the sum of 3000*l.*, part of the 5000*l.* charged on the settled estates, was raised out of those estates and was paid over to the husband.

On the 11th August, 1806, John Scott the elder, in part advancement in life of his youngest son William, by deed, to which himself and William were the two parties, conveyed to William in fee certain lands called Dromsinglass or Cragmoher, worth about 300*l.* a year.

By an indenture, dated 28th February, 1807, made between John Scott, of the first part, Bindon Scott, therein described as his eldest son and heir, of the second part, and John Percy and Samuel Spaight, of the third part, reciting the marriage settlement of John Scott, and that his son Bindon Scott was under that settlement tenant in tail of the settled lands; that John Scott had since purchased the lands of Crevagh, and that he had lately, without any pecuniary consideration, and as his free gift, conveyed the said lands (then of the yearly value of 800*l.*) in reversion after his own decease to his son John Scott the younger; and that he had since his marriage acquired the lands of Cragmoher (of the value of 300*l.* per annum), and that he had, in like manner, conveyed them to his son William Scott, and reciting the payment of the 3000*l.* on the marriage of Diana Scott, and an agreement to charge his unsettled real estates with a sum of 2000*l.* for the two daughters of that marriage; which said gifts, conveyances, and agreements were to be in full of the shares of the said John, William, and Diana, under their father's marriage settlement, and

of any devise, &c.; and further reciting that John Scott the elder had likewise acquired the lands of Knoppogue, Masnery Lane, and others, and was possessed of personal estate to a large amount, all which he was then minded to convey to his eldest son, Bindon Scott, for the considerations, &c. thereafter * ex- * 1068 pressed, that is to say, that Bindon Scott should undertake the payment of all the debts of his father; that all the lands previously undisposed of (subject to the charge of 2000*l.* to the daughters of Vandeleur) should be conveyed (as therein described); and that Bindon Scott should call in all the personalty, &c.: It was witnessed, that John Scott the elder, in consideration of natural love, &c., and also of the covenants and agreements therein contained on the part of Bindon Scott, granted, &c. unto Percy and Spaight the lands of Knoppogue, Masnery Lane, and other lands therein mentioned, situated in the county of Clare, to hold upon the trusts thereinbefore mentioned, to the use of John Scott for life, and after his decease to his eldest son Bindon Scott for life, remainder to trustees, remainder to the first and other sons of Bindon Scott in tail male; and John Scott assigned all his personal estate (of which, however, no schedule was attached to the deed) to Bindon Scott, for his own use and benefit, and appointed Bindon his attorney, to call in his personal estate. The deed then provided that nothing therein contained should prevent John Scott from calling in, recovering, releasing, &c. the same, as fully as he, his executors or administrators, could do, nor to prevent him from recovering, &c. during his life the arrears of rent out of the lands and premises that now were or thereafter might be in his possession. Bindon Scott covenanted, in consideration of the release and assignment, that he would pay all the debts of John Scott, and save him harmless from all costs. This deed was executed on the day it bore date, and was registered on the 1st of June, 1807.¹

* Some discussions as to this deed appeared to have * 1069 taken place among the members of the family, and in-

¹ The deed was prepared by Mr. Charles Burton (afterwards a Judge of the Court of King's Bench), who wrote a note thereon, in which he said: "It is very necessary to observe that a conveyance of this nature, which puts the grantor out of the power of disposing by will of any part of his freehold or personal estate, is always liable to be questioned, and is always considered as subject to great suspicion, particularly in a Court of Equity; nor could any aid be given in a Court of Equity to carry its provisions into effect."

structions for a fresh deed were laid before Mr. Burton, in consequence of which two deeds were prepared, dated respectively the 12th and 13th June, 1807.¹

To the deed of the 12th of June, 1807, John Scott the elder, Bindon Scott, William Scott, and Percy and Spaight were severally parties; it contained all the recitals made in the previous deed of the 28th February, but did not in *terms

*1070 refer to that deed. John Scott, in consideration of love and affection, and of the covenants therein contained by Bindon Scott, granted, released, &c. ; and William Scott confirmed unto Percy and Spaight all the lands contained in the deed of February (except the lands of Knoppogue) to the use of John Scott for life, then to Bindon Scott, remainder to his heirs in tail male. The assignment of personality was then repeated. Another deed was executed on the 13th June, 1807, to which the same persons were parties, for making a further provision for William Scott, whereby, in addition to the lands of Cragmoher, John Scott released, &c., and Bindon ratified and confirmed to the trustees the lands of Knoppogue to John Scott for life, then to William for life, with

¹ Mr. Burton, who said he was pressed with business, prepared a rough draft of these deeds, adding in a memorandum, "I have read the deed of the 14th of February, 1807, and the copy of the deed of the 28th of February, 1807, the limitations of which make the proposed arrangement a matter of some awkwardness, for it is impossible while that deed remains for Mr. Bindon Scott to do anything more than convey a life interest. If, therefore, the parties choose to have the proposed arrangement take place by way of settlement, it appears to me that the only practicable mode is to cancel both the deeds of the 14th and 28th February, 1807 (neither of which, as I understand, has been registered), and to execute two new deeds, one limiting the lands of Knoppogue as above stated to be agreed upon, the other limiting all the other lands and premises as they are already limited by the deed of the 28th day of February, 1807. This deed (I mean that to Mr. Bindon Scott) should bear date and be executed before the deed to Mr. William Scott, and Mr. Bindon Scott should be a confirming party to the deed to Mr. William Scott, and Mr. William Scott a confirming party to the deed to Mr. Bindon Scott. I have altered the copy of the deed of the 28th February, 1807, to the form in which it must now be again engrossed and executed.

"I must add (as I believe I have before observed), that this mode of making family arrangements of property is objectionable on many accounts, and generally leads to suits instead of preventing them. It would, in my apprehension (unless there is some peculiar reason for preferring the present mode), be much more advisable to cancel both deeds, and then for Mr. John Scott to execute a will limiting the different estates and premises in the way which is now mutually agreed upon."

remainder to his heirs in tail male, with a power to every tenant for life in possession to charge the same with a jointure of 200*l.* a year, and a covenant by John Scott the elder and by Bindon for quiet enjoyment; and it was thereby declared that such conveyance was in satisfaction of all the claims whatever of William as to real or personal estate under any settlement or otherwise.

John Scott the elder died on the 22d November, 1808, leaving his two sons, Bindon Scott the eldest, and William Scott the youngest, him surviving. On his death, William Scott entered into possession of the lands of Knoppogue, claiming to be entitled thereto under the deed of 18th June, 1807. Bindon Scott married in 1810, and the respondent was his only son and heir. Bindon Scott paid off the mortgage to the Bishop of Elphin, and on 21st September, 1811, obtained a reconveyance of the mortgaged premises; he also, in performance of the covenants in the deed of 28th February, 1807, paid the debts owing by his father, and paid off the charge of 2000*l.* created for the two daughters of Vandeleur. He died in February, 1837, leaving the respondent his heir, and the first tenant in tail *under the deed of *1071 February, 1807. William Scott married in 1815. Bindon Scott was a party to his marriage settlement, in which the lands of Knoppogue were included, and were charged with a jointure for the wife. William Scott died in May, 1843, being then in possession of the lands of Knoppogue under the deed of June, 1807, leaving the appellant, his eldest son, who immediately entered into possession of the said lands.

John Bindon Scott (the present respondent) claimed these lands of Knioppogue under the deed of the 28th February, 1807, and in Hilary Term 1844 brought ejectment against John Scott (the appellant), who had succeeded his father William Scott in the possession of them, and who rested his title on the deed of the 13th June, 1807. At the trial of the cause at the Clare Summer Assizes, in 1844, the defendant contended that the legal estate having become vested in Bindon Scott by the reconveyance of September, 1811, the claim ought to have been before enforced, and was now barred by the Statute of Limitations. The learned Judge adopted that argument, and directed a verdict for the defendant. A motion for a new trial was refused by the Court of Queen's Bench.

On the 27th May, 1845, J. Bindon Scott filed his bill in this

cause against John Scott, in which he set forth the deed of 28th February, 1807, and the proceedings in ejectment, and prayed that the trusts of the said deed, so far as related to the lands of Knoppogue, might be carried into specific execution ; that the plaintiff might be declared entitled to the possession of them ; that the reconveyance of September, 1811, might be decreed to have been obtained by Bindon Scott in the character of trustee for any persons having any estate therein by virtue of the deed of February, 1807, or that the defendant might be compelled to admit on the

trial of any ejectment that John Scott the elder was seised

* 1072 in fee of the said lands at the time of the execution * of the said deed, and that the plaintiff might be declared entitled to an account from May, 1838, and to an admission of assets, and an account, and further relief.

In October, 1845, John Scott put in his answer, by which he admitted that John Scott the elder had been seised in fee of the said lands, and he set forth the deeds of 11th August, 1806, and 12th and 13th June, 1807, and alleged that the deed of February, 1807, was a voluntary conveyance to Bindon Scott, and was not executed on considerations for value as alleged in the bill, and that it ought not to be treated as a *bona fide* conveyance, so as to defeat the conveyance of the lands of Knoppogue to William Scott ; and that the said lands must have been introduced into the deed of February, 1807, through ignorance or collusion ; and that the registration of the said deed was fraudulently made pending negotiations for the new settlement of the property in June, 1807, and ought not to be allowed to prejudice the deeds then made, which he suggested were prepared, on the recommendation of Mr. Burton, as a substitute for the deed of the preceding February. The answer submitted that the indenture of 13th June was a conveyance for a valuable consideration, and alleged a legacy to William by his father of 2000*l.* ; but that William had, in virtue of the deed of 13th June, 1807, never claimed either that legacy or any portion of the 5000*l.* under the settlement of 1763. It then alleged that William, with the knowledge of Bindon Scott, had expended large sums in improving the Knoppogue estate, and that William had charged a jointure on said lands to the amount of 200*l.* a year.

The cause was heard before the Right Hon. Maziere Brady, the Lord Chancellor of Ireland, who, by a decretal order of

28th June, 1848,¹ directed it to stand over till there * had * 1073 been another proceeding by ejectment, at the trial of which all temporary bars were to be waived: and further directions were reserved. Another action was accordingly brought, and on the trial, at the Spring Assizes of 1849 for the county of Clare, the appellant obtained a verdict, the jury finding, on the two issues then raised, that the deed of February, 1807, was not, but that the deed of June, 1807, was, executed for a valuable consideration. That verdict was set aside on grounds entirely relating to evidence, and the cause was again taken down for trial at the Spring Assizes in 1850; but the appellant did not appear, and the respondent, in Easter Term, entered up judgment by default. The cause in equity came on in December, 1850, for further directions, when the Lord Chancellor made a decree, directing that possession of the lands of Knoppogue should be delivered to the respondent, and that an account should be taken from the 27th May, 1839, of the rents received by William Scott up to the time of his death, in May, 1843, and by the appellant since the death; and the costs were apportioned. This appeal was brought against this decree, and the previous decretal order on which it was founded.

Mr. Isaac Butt (of the Irish Bar) and *Mr. Rolt* (*Mr. Selwyn* was with them) for the appellant.—The deed of February, 1807, was a voluntary deed. The pretended consideration on the part of Bindon Scott, of paying the debts of his father, was merely nominal, for he received at the same time an assignment of the personal property, which shows that the payment really came from the father's estate. Disputes arose in the family in consequence of this deed, and these disputes, as the parties to the deed had then full power to revoke it, were to be arranged by a new disposition of the property. At that * time no one knew or * 1074 believed that the deed was registered, and the advice given by Mr. Burton went on the presumption that no registration had taken place. The deed of the 13th June was to be a substitution for that of February, and the registration of the deed of February must actually have taken place after all parties had entered into an agreement to defeat it, and while that agreement was before Mr. Burton in order to be put into a legal form. Such a regis-

¹ 11 Irish Eq. 487.

tration was a fraud, which Equity will not assist to render effectual. The fact that the deed of February gave an interest to the children which Bindon Scott might possibly have by any future marriage cannot prevent the new settlement of June from taking effect, for the deed of February was a voluntary deed, and these children were, as against the joint act of all the parties, mere volunteers. Bindon Scott had not married in June, 1807, nor was his marriage then contemplated, and therefore no bill could have been filed on behalf of children to compel the registration of this voluntary deed. The Courts will not treat such a provision for future possible children as meritorious, otherwise a settlement by a bachelor on a possible child might be good.

[LORD ST. LEONARDS. — In the case you put, if that was followed by a marriage, *Brown v. Carter*¹ shows that it would be very difficult to upset such a settlement.]

Here it is not pretended that the marriage of the respondent's father, which did not happen till 1810, took place in consequence of the settlement of February, 1807. On the other hand, the appellants, as the children of the marriage of W. Scott in 1815, are purchasers for value under the settlement made on his marriage at that time. The marriage took place in virtue of * 1075 the deed of * 1810, and if that deed had been (which it was not) a voluntary deed, the marriage converted it into a contract for value.²

Whatever rights Bindon Scott had previously possessed, he gave up on becoming a party to the deed of June, 1807. On the other hand, the deed of June being executed for valuable consideration, and William Scott having married while he was in possession of the lands of Knoppogue conveyed by it, his children must be regarded as purchasers under that deed, and therefore entitled to enforce its execution against a previous voluntary conveyance. If two parties, for a valuable consideration, enter into a contract, of which one of the stipulations is for the benefit of a stranger, even though no consideration moves from him, neither of the contracting parties can afterwards object to the stipulation : *Davenport v. Bishopp*.³ Either of them may enforce it against the other : *Colyear v. Mulgrave*.⁴ This principle was fully applied in *Heap v. Tonge*.⁵

¹ 5 Ves. 862. See the observations of the Master of the Rolls, 866.

² Vendors and Purchasers, p. 931, ed. 1846.

⁴ 2 Keen, 81.

³ 2 Younge & C. Ch. 451.

⁵ 9 Hare, 90.

It is clear that the appellant has a good title at law. If so, Equity will not interfere to defeat it. The order is wrong in having done more than enable the respondent to go to a fresh trial; it ought not to have put him into possession.

Mr. Fitzgerald (of the Irish Bar) and *Mr. Fleming* for the respondent.—The deed of February, 1807, was executed for a valuable consideration; namely, the covenant for the payment of the father's debts. There is nothing to show that consideration to have been colourable. Bindon Scott performed that covenant, and has a right to the benefit for which it was a consideration. But the respondent is not bound to show *that *1076 performance; for where a deed of this kind exists and is registered, it lies on those who impeach it to show by positive evidence that it is invalid. Even if that was not so, the consideration here would be sufficient. Becoming surety for the debt of another, exonerating a husband from payment of a wife's debts, and a promise by an executor to pay a creditor of the testator, are all sufficient to found a consideration. But here it is one of a much stronger kind, and the undertaking has been executed.

One argument on the other side is, that though the conveyance to Bindon Scott might be good, it does not operate in favour of his children. The case of *Heap v. Tonge*¹ is not in point, for in that case there was no question of a purchaser under the deed. But though it may be true that a marriage consideration will not of itself sustain a benefit to collaterals, yet if a stipulation is made that it shall do so, it will have that effect. Here is a valuable consideration, and the contract founded on it expressly applies to the life estate of the father and to the children. It therefore enures for their benefit: *Roe d. Hamerton v. Mitton*.² *Pulvertoft v. Pulvertoft*³ shows that the consideration of marriage extends to persons not directly within it. The consideration here was good: *Persse v. Persse*,⁴ which carried the case further than any other; and there and in *Doe d. Baverstock v. Rolfe*,⁵ it was declared that the inclination of the Courts always appears to have been to support a fair settlement in favour of the persons intended to be benefited by that settlement. The cases of *Davenport v.*

¹ 9 Hare, 90.

⁴ 7 Clark & F. 279.

² 2 Wils. 356.

⁵ 8 A. & E. 650.

³ 18 Ves. 84, 92.

*Bishopp*¹ and *Colyear v. Mulgrave*² are not in point, for *1077 they were mere executory * contracts : here that was not so, though the fact of the legal estate being outstanding compelled the respondent to come to Equity for aid. Besides, the part relied on in the former case is a mere dictum of the Vice-Chancellor, who says that one party to such a contract shall not have the power to recall it, and then adds, " mutual assent must generally be requisite to dissolve that which by mutual assent was created." On that it is argued that the mutual assent of the two contracting parties to the deed of February could revoke that deed ; but that cannot be so, for the deed was given for a valuable consideration ; it vested rights in third persons, and was registered, so that their rights were completely protected against the acts of any one.

The decree was right in directing an account, for here the title was strictly a legal title ; *Hicks v. Sallitt*,³ where it was held that a purchaser having notice of a will under which an infant claimed, and the infant having asserted his right speedily after his title accrued, and without laches, the infant was entitled to an account of the rents and profits from the time at which his title accrued.

If there was any fraud in the act of registration, though the registry might make a title valid as between the person registering and a stranger, it would not assist the former as to those on whom the registration was a fraud : *Forbes v. Deniston*.⁴ But here there was no fraud ; the settlement was made on a good consideration, and even if voluntary, being for the benefit of the children of a marriage, it might be enforced as against the parties to it :

*1078 *Brown v. Carter*,⁵ *Kekewick v. Manning*.⁶ The case * of *Forbes v. Deniston* is almost identical with the present, and *Davenport v. Bishopp* shows that under circumstances such as exist here, neither one of the two contracting parties has power at his own pleasure to defeat such a settlement.

Mr. Butt, in reply. — The appellant stands in the place of a purchaser for valuable consideration without notice, and his rights must be considered with relation to that fact. Here the marriage

¹ 2 Younge & C. Ch. 451.

⁴ 4 Brown, P. C. 189.

² 2 Keen, 81.

⁵ 5 Ves. 862.

³ 23 Law J. N. S. Ch. 571.

⁶ 1 De G., M. & G. 176.

of the appellant's mother took place on the faith that the estates were settled on William and his children; so that even admitting the first deed to have been for a valuable consideration, they had no notice of that deed, which was at that time believed not to be registered. Being purchasers for valuable consideration, and without notice, a Court of Equity will assist them, and will not take the least step, not even to perpetuate testimony, against them: *Jerrard v. Saunders.*¹ Here the estate is now in the appellant by virtue of the Statute of Limitations. It lies on the other side to get rid of that title.

March 13.

THE LORD CHANCELLOR.—After stating the circumstances of the case: It appears that in the year 1811 Bindon Scott paid off the mortgage conformably to the covenant he had entered into to pay his father's debts, upon which occasion the legal fee was conveyed to him; and there can be no doubt that when he took that conveyance he took subject to the equitable rights of all the parties under those deeds, whatever was the fair construction of them. Under the first deed he became the trustee of Knoppogue for himself for life, afterwards to his first and other sons; but he then conveyed * away his own life interest, by deed, *1079 to William Scott, concurring therein with his father in making the conveyance to his brother.

In 1844 John Bindon Scott brought an ejectment, claiming that under the deed of February, 1807, he, upon the death of his father, became entitled to this property; he had, in fact, become entitled seven years before he brought the ejectment. He brought the ejectment, but he failed; and he failed for a reason, the force of which I own I do not altogether feel. It would seem that he failed because he had too much estate, not because he had too little; because Bindon Scott, being the person to whom this legal fee was conveyed, and therefore from whom it would have descended upon his son, it is said that during all the life of William Scott, Bindon Scott was the owner of the legal fee, but that, possession never having accompanied it, William Scott must be considered to have obtained by the Statute of Limitations a good title to the fee against him. That decision has not been quarrelled with, and it is, therefore, proper to assume it, for the purpose of

¹ 2 Ves. Jun. 454.

the present argument, to be correct. The result is, therefore, that Bindon Scott was deprived of his estate, by virtue of the Statute of Limitations, by the possession of his brother William, and consequently John Bindon Scott, his son and heir, could not recover in that ejectment. Failing in the ejectment, John Bindon Scott was driven to seek relief in equity. His equity was this: under the deed of February, 1807, he was the equitable owner of the estate tail, but only equitable owner because the legal fee was outstanding, first in the mortgagee, and afterwards in those who claimed under the mortgagee; therefore he came to a Court of Equity, desiring to have relief given in equity, asking that

*1080 any persons who had the legal fee, whoever they * might be, might be ordered to convey to him, and that he might be put into possession.

In answer to that claim, the appellant, as William Scott's son, set up this defence: He said that the deed of February, 1807, was a voluntary deed, and that after that deed was executed the parties to it, for a valuable consideration, made, in June, 1807, a settlement of Knoppogue upon William Scott for his life, with remainder to his first and other sons; that that deed of June was a deed for valuable consideration, which, therefore, put an end to the original deed of February, and displaced the interest of all those who were entitled under it. That defence being set up, the question came to be argued before the Court of Chancery in Ireland in the year 1848. The Court reasoned thus: whether this is a valid defence or not is purely a legal question, except so far as relates to the bar created by the outstanding legal fee; therefore let the matter be put in a proper train of inquiry, and let the plaintiff (the present respondent), who is seeking relief in equity, viz. John Bindon Scott, bring his ejectment, and let the temporary bar, as it is called, be put out of the way; let it be treated just upon the same footing as if John Scott, the original settlor, had been seised of the legal fee at the time he made the settlement instead of the equitable fee.

It is said that upon several grounds no relief whatever ought to have been given to this respondent; in the first place, because the plaintiff in the equity suit (who was the plaintiff also in the ejectment) had no right to ask relief against the children of William Scott, because they were purchasers for a valuable consideration, and without notice. How were they purchasers for a valuable

consideration? They were purchasers originally under that deed of the 13th of June, 1807; but on the face of that *deed, it is a voluntary deed, and that being so, it could *1081 only be determined in a trial properly directed by the Court whether that was or was not a valid instrument. So again with reference to the original deed of February, 1807; on the face of that deed, it was a deed for valuable consideration, because there was a covenant on the part of Bindon Scott to pay and discharge his father's debts, which is, to all intents and purposes, a valuable consideration. It may be that that was a fraud, and that it was merely colourable; the evidence would seem to show the contrary; but whether that was good or not was exactly the question to be tried at law, and upon which a trial did, in truth, proceed. The jury determined that the February deed was voluntary, and that the June deed was not voluntary. That verdict, upon the motion for a new trial in the Court of Queen's Bench, was set aside. The Court of Queen's Bench was of opinion that the first deed was a deed for valuable consideration, and that the second was a deed without valuable consideration. The Court consequently directed a new trial. The parties have not chosen to avail themselves of a new trial, and the result is, that we must consider that judgment to be binding and conclusive.

What is now insisted upon is, that no relief ought to have been given in equity, even supposing the second deed to have been in its inception a voluntary deed, for that William Scott's children were purchasers for value. William Scott married in 1815; and on the occasion of the marriage a settlement was made, in which that deed was recited, and Bindon Scott was a party to that settlement. It has, therefore, been contended that although the deed was voluntary in its inception, yet as the parties acted upon it, and treated it as being the deed which gave the estate to William's issue, and as William's wife *married upon the *1082 faith of that being the deed for her and her issue, therefore the voluntary character of the deed is displaced. But that argument cannot prevail if the first deed was a good deed. The case, therefore, stands thus: there are two deeds, a deed for value in February, and another deed in June, which, though not then for value, was, according to the arguments, made a deed for value in 1815. But *prior tempore potior jure*; the first deed in February must prevail, as having been a deed for value, and of

course it would take precedence over that which was subsequently executed.

The whole case depends upon this fact, and that being so, it follows of course that the plaintiff who seeks relief upon the footing of the valid deed of February, which relief would have been purely legal but for the outstanding term, must properly have such relief given to him in equity as to put him in such a situation as if the relief he sought, founded upon a valid deed at law, had been legal, and not equitable.

With regard to the suggestion that this outstanding legal fee acquired by disseisin is to defeat the rights of the parties, I do not concur in the observations which have been made. It is admitted, that if the party who by virtue of the Statute of Limitations claimed to have got the legal fee, had so got it by conveyance, with notice that the party from whom the conveyance proceeded was a trustee, he could not have taken it except upon the trusts upon which the party from whom he took it held.

In these circumstances, it was perfectly right to direct a trial, and the result of the trial must be taken to be that which was the result of the motion for the new trial in the Court of Queen's Bench in Ireland. That being so, the only remaining questions

are as to the propriety of the second decree, which appears *1088 to me to *admit of no sort of doubt. It was perfectly

right that the party should have a decree putting him in possession of that which was outstanding in trustees, and should obtain such an account as the Court is in the habit of giving, viz. an account of the mesne profits for six years, from the person who holds to the party entitled, as if it had been a legal instead of an equitable estate. I shall therefore move your Lordships that this decree should be affirmed.

LORD BROUGHAM.—I only think it necessary to say that I entirely concur.

LORD ST. LEONARDS.—I also think that this case must be decided against the appellant. As the questions are of some importance, I shall trespass upon your Lordships for a very short time. As I understand the argument of the appellant, he puts the case simply upon his legal title; he says, "I have a legal title by adverse possession, and I am in a situation in which, in a Court of Equity, you are not entitled to claim relief against me." Now, as

regards his legal title, that came before a Court of Law in Ireland, which decided that the legal title, under the Statute of Limitations, did prevail independently of any equity. That depended upon a very nice point. If there had been originally a conveyance in this case of the legal estate instead of their being a conveyance of the equitable estate, it is perfectly clear that the Statute of Limitations would have been no bar, because then William, taking by a conveyance (which is what distinguishes this case from the cases where there is an adverse possession without a conveyance) from a man who under a settlement was tenant for life, never could have set up his possession during that tenancy for life, against the tenant for life ; and although it might * have *1084 been conveyed to him in words for his own life, he could not have set up that estate, so acquired by actual conveyance, as a bar to the remainder-man under the settlement under which the person who conveyed to him claimed. This singular state of circumstances therefore happened, and the consequence is what I will state. The legal fee was outstanding ; the conveyance, therefore, was only of the equitable estate ; but the person who had the equitable tenancy for life conveyed to William, what must be held to pass (with the view I am now regarding it) only his life estate, and the remainder-man was not affected. If the person who had thus conveyed the equitable estate ultimately obtained a conveyance of the legal fee, that was, as regarded him, an admission that the legal fee at that moment was an operative estate. What was the consequence ? It was this : that the legal estate being afterwards got in, his previous conveyance would not, as in many cases of life interest, operate by way of estoppel against the legal fee thus subsequently obtained ; but the moment he obtained that legal fee he became the trustee for the persons who claimed under the settlement. Now, who were the persons who claimed under that settlement ? The first was William Scott, for he had by conveyance obtained the right to the equitable estate of Bindon Scott, and when Bindon Scott therefore obtained the legal fee, William Scott became entitled to the equitable life interest of Bindon Scott to be carved out of the legal fee. Then at law it would have been open to contend (I mean to give no opinion binding myself at all upon that point, but I confess I should be strongly disposed to think so) that under the Statute of Limitations this view might have been taken of it : This estate which you (William Scott)

claim, you claim by conveyance from Bindon ; the legal estate was at the time of that conveyance outstanding ; Bindon

* 1085 * got in that legal fee ; Bindon never could have proceeded against you upon that legal estate, because if he had been so foolish as to bring an ejectment, Equity would instantly have stopped that ejectment ; for by the operation of the conveyance in fee he would have been estopped from asserting any right to that legal estate during the whole of his own life. Should not there be a corresponding right ? If the one party is to be bound, ought not the other party to be bound ? Where was the difficulty for a Court of Law to say that William Scott held under Bindon Scott, and that Bindon Scott having obtained the legal estate, the possession of William Scott was the possession of Bindon Scott, and that William Scott claiming under Bindon Scott, never could be heard to say that he held adversely to Bindon by the settlement under which William had obtained nothing more than a life estate. However, it was decided otherwise, and this House is not now called on to reverse that decision.

Then as regards the equity. I can have no doubt in recommending your Lordships to hold, as a point of law not to be disputed, that that legal estate became a trust for all these persons, and that consequently, although, at law, William Scott might himself, as against the children of Bindon Scott, set up his possession, it was, in reality, no adverse possession. Although that phrase may perhaps be used in a different sense to that in which it was used before the 3 & 4 Wm. 4, c. 27, yet I see no difficulty in advising your Lordships to come to the conclusion that that legal estate never could be set up as against those parties who had, after the conveyance of the equitable estate, entitled themselves to the legal estate. The question at last resolves itself into the right as between these parties under the different settlements. Who is

entitled to the estate ? Take the first settlement under * 1086 which Bindon * Scott claims ; it is perfectly clear, in point of law, that upon the face of that settlement, it is a settlement for valuable consideration, which never can be impeached. No settlement was ever more so. Like any other deed, it may be impeached by showing that the consideration is not truly stated ; that that which appears to be the real consideration was not the true consideration ; that it was a sham and a pretence ; that there was collusion, and that there was fraud. That is a question for a

jury. The parties here went to a jury upon that very question, and a wrong verdict was given; but the Court reversed that finding, and properly stated that there was not a *scintilla* of evidence to show that the first consideration was a fraudulent one. Then what is the consequence? The first deed stands, and the second deed cannot interfere with it as far as regards the consideration. The parties had a right to re-try that question; but when the moment came for that purpose, they entirely withdrew from the opportunity which had been offered them. They deserted the case. The decree therefore necessarily went against them in the Court of Equity, and this House is bound to consider that, in withdrawing from the trial of that question, the appellant admitted that the consideration in the first deed was a valid and real consideration, and that there was no pretence for denying it. This House must consider that as a settled point.

When we look at the deeds with the eye of a real-property lawyer, all difficulty vanishes; I never, indeed, could understand where the difficulty was. The first deed was a perfectly binding deed, and there was an attempt to concoct and set up a title as against that deed. I cannot mention Mr. Burton's name without stating the high respect and regard which I have for the memory of that learned person, who became so illustrious a Judge in *Ireland; but he was pressed with business, and was *1087 not able to do more than chalk out the draft of the intended deed, and consequently he did not give the advice which I should have expected from his practical knowledge; he advised the parties, if the first deed was not upon the register, to do something, which no counsel ever should advise parties to do, namely, to put aside and cancel a deed, and endeavour to make a title in lieu of it. In my experience, I never knew any attempt of the sort which did not end in failure, and in involving the parties in litigation probably as expensive and as long as this has been.

The attempt was to get rid of the deed of February, and form a new title. These two subsequent deeds were meant for that purpose; but the first deed, that of February, now stands as the deed for valuable consideration; it was prior in point of date, and was upon the register before the second deed was executed, so that the second deed, whether for valuable consideration or not, never could come into competition with the first.

It was the absolute duty of the solicitor to register the deed of

February, which included other lands besides those mentioned in the deed of June, in order to give effect to those titles which were not intended to be affected by the new arrangement. The new arrangement was a contrivance (I regret it ever was resorted to) to defeat the actual title, and it has failed in its object. I am clearly of opinion that there is not the least pretence for affecting the respondent's title in this case ; and I therefore submit to your Lordships that this appeal should be dismissed, with costs.

Appeal dismissed : Decretal Order of 28 June, 1848, and Decree of 11 December, 1850, affirmed, with costs.

Lords' Journals, 13 March, 1854.

1854. February 21, 23, 24.

FREDERICK WILLIAM, Marquis of Bristol, *Plaintiff in error.*
JANE MARY ROBINSON, *Defendant.*

Practice.

On the hearing of a cause, in which the question intended to be brought up for decision depended on the form of the pleadings, and the House, after argument, was of opinion that the pleadings would not allow that question to be properly decided, time was given to allow an arrangement between the parties, by which the pleadings might be altered for that purpose.

THIS case arose upon *quare impedit*. The facts were stated in the form of a special verdict, and judgment was given thereon by the Court of Common Pleas,¹ which judgment was afterwards reversed in the Court of Exchequer Chamber.² A writ of error was brought in this House, and, after the arguments had been fully heard,—

THE LORD CHANCELLOR intimated that the state of the pleadings would not enable the House to decide the question really intended to be brought into discussion. The House would allow it to stand over, to enable the parties to alter the pleadings so as to effect that purpose.

¹ 11 C. B. 208.

² 11 C. B. 241.

The cause accordingly stood over, but before it came on again, a compromise had taken place.

Mr. Cowling and *Mr. Badeley* (*Mr. Scotland* was with them) argued the case for the plaintiff in error, and *Mr. Bramwell* and *Mr. Hayes* (*Mr. Brewer* was with them) for the defendant in error.

1854. March 13, 14.

MAYOR OF LONDON and others, *Appellants*.
COMBE and others, *Respondents*.

Practice.

The House will refuse to allow a cause to stand over indefinitely, though upon an understanding that the appeal is to be compromised, but will require it to be proceeded with in its regular turn, or to be withdrawn.

This was an appeal against a decree of Lord Chancellor Lyndhurst, which had affirmed a decision of Vice-Chancellor Knight Bruce.

In this case there had been a bill filed by the appellants in the Exchequer in Equity to enforce their right of metage of all grain brought up the Thames to the brewhouse of the respondents. The respondents had filed, in the same Court, a cross bill of discovery, to which the defendants put in their answer, admitting possession of books, &c., but denying, on belief, that these books if produced would prove the allegations in the cross bill. The cause was transferred by 5 Vict. c. 5, with all others then pending in the Exchequer in Equity, to the Court of Chancery, and was heard before Vice-Chancellor Knight Bruce, who, in June, 1842, made an order in conformity with the prayer of the cross bill,¹ and the Lord Chancellor (Lord Lyndhurst) on appeal (December, 1845) confirmed the order.²

An appeal was brought against that decision. When the cause was called on.

The Solicitor-General (*Sir R. Bethell*, with whom was *Sir F.*

¹ 1 Younge & C. Ch. 631.

² 15 Law J. N. S. Ch. 80.

Kelly) said that he hoped the House would not be troubled with this case, and requested that it might stand over, it being understood that it was likely a compromise would be effected.

* 1090 * THE LORD CHANCELLOR.—The proper form is to present a petition to be allowed to withdraw from the appeal.

The Solicitor-General said that such a petition should be presented. In answer to the question, when it would be presented, he said, before the end of the session.

The Lords could not assent to that delay. The cause must be proceeded with in the usual course, or the decree of the Court below must be affirmed.

Their Lordships afterwards permitted the case to stand till the following day.

The Solicitor-General on the following day prayed leave for the appellants to withdraw the appeal upon payment of costs to the respondents.

Mr. R. Palmer, with whom was *Mr. Lake Russell*, for the respondents, assented.

Leave granted.

1854. March 16.

ROBERT HULL TERRELL, *Appellant.*
JAMES HUTTON, *Respondent.*

Winding-up Act. Equitable and Legal Debts. Costs.

The intention of the 11th & 12th Vict. c. 45 (the Winding-up Act of 1848), was to provide for debts recoverable only in equity, as well as for those recoverable at law; and the Master has an uncontrolled discretion (subject to appeal) to allow or disallow, or to allow as a claim only, according to the proofs adduced before him, any demand against a company.

Certain persons proposed to form a company; they employed A. as their solicitor; he was so named, on provisional registration, under the Joint Stock Company's Act; the directors were not to be personally liable to the officers of the company; the solicitor was continuously employed, until after the company had been completely formed and registered, and until it was wound up. The 44th article of the deed of settlement declared, that "a sufficient part of the funds

of the company should, upon complete registration, be appropriated in payment of the expenses of and incidental to the formation of the company, including those of or having reference to the preparation and execution of that deed." When the company was before the Master on the Winding-up Act, the solicitor presented a demand for services from the earliest period up to that time. The Master allowed the demand as a claim only, and not as a debt, leaving the solicitor to proceed at law: —

Held, reversing an order of Vice-Chancellor Kindersley which had permitted the order of the Master to stand, that the Master ought to have allowed this demand as a debt, but subject to proof that the items came under the description contained in the 44th article, and subject also to taxation.

As the solicitor had omitted to bring the 44th article to the notice of the Vice-Chancellor, his order, though reversed, was reversed without costs.

IN 1846 two gentlemen named Holt and Swift proposed to establish, in London, an insurance company, under the name of "The Independent Life Assurance Company." The appellant was employed as attorney and solicitor in the formation thereof. The proposed company was provisionally registered on the 13th February, 1847, and on the same * day the appellant * 1092 was formally appointed by the promoters to be the attorney of the proposed company, and his name was so registered. On the 15th May, 1847, at a meeting of the directors, several resolutions were passed, one of which confirmed the appointment of the officers of the company, subject to the provisions of other resolutions then agreed to. Of these, the 12th declared, "That no director shall be personally responsible for the salaries of any of the officers of the company, and that no officer shall obtain payment for his services until a sufficient sum shall be obtained by the funds of the company for that purpose. Nevertheless, the first fund that shall be formed by the payment of the deposits on the shares to be taken by the directors and others shall be appropriated to the payment of the expenses of the formation of the company." At a meeting held on the 22d May, it was resolved to raise a subscription to enable the appellant to advertise; the sums subscribed were to be allowed in part payment of shares. On the 3d of August a resolution was passed authorising the appellant "to take the necessary steps for preparing the deeds of the company"; and on the 9th of August another, instructing him to make inquiries respecting offices, and to issue prospectuses, &c. On the 12th August the statutory return of the names of the provisional directors, &c. was made, and this return included the

name of the appellant as solicitor to the company. On the 8th February, 1848, he was instructed as "the solicitor" provisionally to re-register the company. On the 4th March, 1848, a resolution was passed calling for a statement of the liabilities of the company, one of the items mentioned being "the solicitor's bill, including counsel's fees, to be laid before the directors." The bill was sent in on the 9th March; and on the 27th May, in a resolution of the directors, that item was recognised as

*1093 one of the liabilities * of the company. On the 28th August, 1848, the deed of settlement was executed, the 44th article of which was in the following terms:—

"That a sufficient part of the funds of the company should, upon the complete registration thereof, under the provisions of the said Act of Parliament, be appropriated in payment of the expenses of and incidental to the formation of the company, including those of or having reference to the preparation and execution of that deed, and such complete registration as aforesaid, and every deed of supplement for that purpose."

In January, 1850, the Vice-Chancellor of England made an order on petition directing that the company should be wound up, and under this order the respondent was appointed official manager. In April the appellant sent in his bill consisting of an account delivered in December, 1848, to the secretary, with the addition of fees, charges, and disbursements, amounting together to 645*l.* 7*s.* The Master to whom the matter of winding up was referred refused to allow this bill as a debt, but by an order of the 12th July, 1850, declared that it should be allowed as a claim only, with liberty for the appellant to proceed at law. The appellant on the 13th November, 1851, brought this order before Vice-Chancellor Kindersley, who declined to make any order thereon, and directed the costs of the official manager to be paid out of the estate, but refused to allow any other costs.¹ The present appeal was then brought.

Mr. Willcock and Mr. H. Terrell for the appellant. — The Master was wrong in not admitting this demand as a debt.

*1094 It was a matter of account between the parties * under the Winding-up Act, 11 & 12 Vict. c. 45, and ought to have

¹ 2 Simons, N. S. 127. No notice was taken of the 44th article of the deed of settlement when the case was heard before Vice-Chancellor Kindersley.

been adjudicated upon by him, without driving the appellant to an action at law. In *Cope's Case*,¹ where the secretary of this company brought a similar claim against the company, the Master exercised his judgment upon it, and the Vice-Chancellor Rolfe afterwards confirmed his order, with an alteration as to a matter of detail. The observations of the Vice-Chancellor in that case lay down the rule by which cases of this sort are to be governed, and directly apply to the present.

Here a debt is due from the company, and from the company alone can it be recovered. *Halket v. The Merchant Traders' Association*.² *Thompson v. The Universal Salvage Company*.³ In *Lloyd's Case*⁴ the facts were exactly the reverse of those which exist here, and therefore it was held that the creditor must proceed against individuals, and not against the company ; and on the same principle in *Wryghte's Case*,⁵ where the directors of one company lent money to the directors of another company on their own responsibility, and some of the directors who borrowed signed a guarantee for repayment, it was held that under the Winding-up Act the company could not be charged with the debt ; but here the company alone is liable. Where the company is thus liable the Master may make the call, though the time for it has passed ; *Lord Talbot's Case*,⁶ and *Gay's Case* ;⁷ and therefore there can be no difficulty in now directing the Master to proceed in the matter. The case of the *Norwich Yarn Company*⁸ will be cited on the other side ; but there, facts were in dispute, * and the * 1095 case was necessarily sent to a jury. There are no facts in dispute here, except as to the amount, which is properly a subject for taxation.

The Solicitor-General (Sir R. Bethell) and Mr. Roxburgh for the respondent.—The Winding-up Act of 1848 (11 & 12 Vict. c. 45) relates not to the rights of general creditors, but to the settlement of questions among the members of the company. This appellant claimed to be a creditor of the company ; he was not, therefore, within the operation of the Act. It requires the creditor to come in before the Master, with the view of enabling the Master to fix

¹ 1 Simons, N. S. 54.

⁶ 21 Law J. N. S. Ch. 807.

² 19 Law J. N. S. Q. B. 59, 13 Q. B. 960.

⁷ 5 De G. & S. 386.

³ 3 Exch. 310.

⁸ 5 De G. & S. 122.

⁴ 1 Simons, N. S. 248.

⁹ 21 Law J. N. S. Ch. 822.

the sum which must be raised among the members of the company, and also of enabling the debtors to offer payment before proceedings are taken against them at law. But when the debt is disputed, as it is here, the statute has no further operation, and the Master must suspend his proceedings till the debt shall have been established at law. That is the effect of the 73d section. The 75th section prevents collusion between the official manager and the creditor, by requiring the Master to see that there is a good debt; and the 58th section expressly says that, except, as is expressly provided by that Act, nothing therein shall in any way affect the rights and remedies of creditors. That is, that having complied with the urgency of the Act in bringing in his claim before the Master, he may then, if the debt is disputed, go on at law. Such is the effect of the observations of the Lord Chancellor made in the *Norwich Yarn Company's Case*:¹ "What takes place in the

Master's office has nothing to do with the action that is pending. When that Act of Parliament first passed, a *great many applications were made to be at liberty to prove, but the Courts refused to interfere. . . . It is useful that the Master should know the extent of the claims, that he may be regulated in making a call; but it is not intended otherwise to interfere with the creditor."

[THE LORD CHANCELLOR.—There is one mistake there, in the phrase "to be at liberty to prove": I must have said, "to be at liberty to proceed."]

It is quite clear that there was no intention to substitute the Master for a jury, yet such will be the effect of allowing this appeal. Where such a proceeding is allowed, it is because the complicated nature of the account renders a jury an unfit tribunal to decide on it. That is not the case here, where there is a denial of liability.

A large part of this bill was incurred before provisional registration, and another part between that time and complete registration. It cannot be contended that both classes of them come within the 44th section of the deed of settlement, "as expenses of and incidental to the formation of the company." Preliminary expenses include only those things that are necessary for the formation of the company; but from the appellant's bill it is clear that some of his charges were those for trouble incurred in getting

¹ 21 Law J. N. S. Ch. 823, note.

people to approve of the scheme, of which, in fact, he was the originator.

[LORD ST. LEONARDS.—It does not appear that section 44 of the deed of settlement was brought to the Vice-Chancellor's notice. There is nothing in that section relating to preliminary expenses.]

What they were was the subject of dispute before the Master, and he therefore properly referred the parties to law. Antecedently to the formation of the company, the only persons liable to the appellant were those who actually employed him. Those persons alone could afterwards * come on the company for * 1097 repayment of the expenses thus incurred, but the company was not liable to him in respect of such charges.

Mr. Willcock, when about to reply, was asked whether the appellant was ready to submit the bill to examination, to determine whether the expenses he claimed came within the words of the 44th article of the deed, "Expenses of and incidental to the formation of the company"? He answered in the affirmative.

THE LORD CHANCELLOR.—Then, my Lords, I have no difficulty as to the advice I shall give to your Lordships in this case. His Lordship having stated the facts, said :—

The House goes along with the respondent to this extent, that the company ought not to be bound by the items in detail which are included in the bill; but provided it is established that this bill was made up either of items in respect of business properly done by Mr. Terrell after the formation of the company, or of items properly coming within the description of the "expenses of and incidental to the formation of the company, including those of or having reference to the preparation and execution" of the deed, I think it was wrong not to allow this bill as a debt.

I do not at all recede from any words attributed to me in former cases. I think the view which I then took of these Winding-up Acts was correct. The Winding-up Act of 1848 was made for the purpose of enabling such of these companies as, from altered circumstances, or from miscalculated probability of profit, should turn out to be incapable of being prosecuted with advantage, to be wound up. In order to do so the Legislature meant to put them in a situation very nearly the same as if some one partner of any ordinary partnership had filed a bill or got a decree * for winding up the partnership, which would render * 1098

it necessary to take the partnership accounts and settle the liabilities amongst the partners, as well as the nature of the case would permit. Provision was, therefore, made for giving a summary proceeding of that sort by going to the Master's office. In order to enable the Court to proceed to wind up a company, it is material to ascertain what are the debts due by the company. Until that is ascertained, it is impossible to find what sum of money the parties must respectively contribute in order to make up the proper and necessary fund. With that view the 73d and other sections were enacted. To prevent delay and needless expense, any person commencing, or who has commenced, proceedings at law, is prohibited from recovering payment of any debt or demand he may have, without first coming and proving it before the Master, so that the Master may know what is the amount of the debts. What is the course which is then taken? The Master is, by the subsequent sections, directed to raise a sufficient fund for winding up the company's affairs, having regard *inter alia* to the amount of debts proved.

There is no doubt that there was no intention on the part of the Legislature to give to creditors any larger right, or to take from them any portion of an existing right, in respect of the enforcement of their debts. The question here is, whether, under these circumstances, this demand is something which ought to have been admitted as a debt.

I cannot say that I have no doubt on this subject, but I think I see my way clearly to a conclusion, subject to what I have stated as to ascertaining the amount, which must be done by subsequent inquiry, and which the parties at your Lordship's bar are willing

to agree to. Subject to that, I think this is admissible,
*1099 upon the strictest principle, * as a debt under the Winding-up Act, and I come to that conclusion for this reason: Quite independently of the Winding-up Acts, it has been long ago established (Lord Cottenham enunciated the proposition many times) that these companies cannot take the benefit of what has been done by those who have formed them, without thereby incurring responsibilities to those persons. Now, that observation, which has been extended to a very great class of cases under the Winding-up Acts, applies, in my mind, pre-eminently to a solicitor, who is doing that without which the company never could have existed. It is an old and well-known principle in the law, that

when one person does an act as an agent for some other person though then quite unknown to that other, if afterwards the latter adopts the act, it is just the same as if he had authorised it from the beginning. I think that principle will, with the aid of the 44th article, enable your Lordships safely and distinctly to come to a conclusion here. I am not certain that it would not have been sufficient without that article. That which was done for the necessary purpose of forming the company, or in the prosecution of the necessary business of the company, after it was formed, is to be treated as a debt of the company, *ab initio*. If that is so, then the only question is a question as to the amount which is due, because that the appellant did purport to act (whether with or without authority) as the solicitor of some embryo company, cannot be disputed. What I should recommend your Lordships to do is, to allow this appeal so far as to discharge this order, and return it back to the Court of Chancery with the declaration that Mr. Terrell ought to be admitted as a creditor of this company for the amount of all work and business properly done by him since the formation of the company, and for the amount of so much of his bill of costs, of all expenses of and incidental to the *formation of the company, including those of or having reference to the preparation and execution of the deed, and such complete registration as aforesaid ; and also with power to direct the said bill to be subject to taxation. The suggestion must go beyond mere taxation, because the appellant must establish ultra taxation, that these items are items properly coming within the description of the 44th article.

LORD BROUGHAM intimated his concurrence.

LORD ST. LEONARDS.— My Lords, I also entirely agree with the noble and learned Lord on the Woolsack. The matter is not open to any doubt. Under the Joint Stock Companies' Act (7 & 8 Vict. c. 110), it is quite clear that a solicitor might be employed before the company was formed, and it is of necessity that a solicitor should be employed, for there must be a great deal of business preliminary to the formation of any considerable company which a solicitor alone can transact. The Joint Stock Companies' Act does itself expressly provide for the appointment of a solicitor, and attributes to that solicitor the performance of certain duties,

which, without that power in the Act, would be a breach of its other provisions. The 25th section takes it for granted that to a certain extent a company, when formed, will be bound by antecedent contracts, but to what extent that may be is another question.

Then we come to the Winding-up Act. I cannot feel that there is the slightest doubt in the description of a creditor there. "The word 'creditor' shall include every person having any debt or demand enforceable against any company in any Court of law or equity, or for nonpayment, or nonsatisfaction of which * 1101 damages could be * recovered." So that the Winding-up

Act does most expressly provide for what may be called equitable debts as well as for legal debts. Any argument, therefore, to show that there would be a difficulty, if not an obstacle, in the way of recovering at law this particular demand, is of itself a sufficient reason for giving to the party relief in equity if the demand constitutes an equitable debt. The moment you say you cannot recover a debt at law, assuming it to be a just debt which ought to be paid out of the assets of the company, it must properly be recoverable in equity. The intention was to provide for debts recoverable only in equity, as well as for debts recoverable at law.

The 58th section of the Winding-up Act, which has been much relied upon at the bar, does of itself reserve the rights of the parties in those cases in which they are not otherwise expressly provided for by the Act. Supposing that there was no legal right in this appellant to recover, then it falls expressly within the Winding-up Act as an equitable right. In this case it is not the creditor who insists upon bringing the action, but it is the company which insists that the creditor shall bring it.

Passing on to sections 72, 73, and 74, they put the matter beyond all doubt, for they tell you what shall be done before an action is brought by the creditor. They put a restraint upon him, and prohibit him from bringing an action till he has come in to prove his debt before the Master.

The 75th section, to which I find no answer, gives the Master power, according to the proofs exhibited before him, either to allow or disallow, or allow as claims only, such debts and demands. There is nothing to control him in the exercise of this power.

But then there is an appeal against his decision. When * 1102 the case came on in the * Court below, by some accident

the section 44 in the deed was not brought to the Vice-Chancellor's attention. That section puts the company out of Court. The promoters appointed the appellant their solicitor. They have had the benefit of his knowledge and diligence, and made use of him as their solicitor. They have from time to time reappointed him their solicitor. They received his bill, and when they became a company, then he was properly constituted as the continuing solicitor; there was never any break in his employment; he continued throughout, and the effect of not providing for his previous charges would have been this, that the promoters individually would have been liable to the company's debts, and the debt to him among the rest, as far at all events as funds had come to their hands. What would be the result of that? That then they would have had their relief, under the clause of the deed to which I am about to refer, as against the general body. Could any thing be more absurd and improper than that there should be this circuity of action, first by this solicitor against the individual promoters, and then by those promoters against the company of which they form a part? It is quite impossible that any thing of the sort could have been intended.

The contract of all the parties forming the company was this, that they would pay out of the funds of the company all the proper expenses of forming the company, up to and including the cost of the preparation and execution of the deed of settlement. There is no individual responsibility, but the funds are liable; and what constitutes those funds? all the capital whether called up or not. If it has not been called up, it must be called up in order to constitute those funds, the liability of which is rendered clear beyond all doubt by the 44th article.

Here is a clear equitable debt which is provided for by the deed of settlement, and the funds are brought into the *Court of Chancery. Under the Winding-up Act the *1103 question the Master has to ascertain is not simply what debts are due by the company which are recoverable at law, but what debts, *qua* debts, are recoverable as debts against the company, either in a Court of law or in a Court of equity. This debt clearly fell under the latter denomination. It admits of no doubt whatever, that the order of the Vice-Chancellor was made incautiously, the 44th article not having been brought to his attention; it must, therefore, be reversed, but reversed under the

conditions which have been mentioned by my noble and learned friend.

As the cause of the mistake must be considered to rest with the appellant in not having brought the matter properly before the Court, and in insisting also upon the whole of his demand, which demand certainly ought to be subjected to an investigation, he would appear to be justly liable to costs ; but it would be going too far to make him pay the costs of the appeal and yet to give him a decree ; and therefore what I submit to your Lordships is, that there ought to be no costs given in this case.

The following order was afterwards entered on the Journals :—

That the claim of the appellant to be a creditor of the said company in respect of business done by him as the solicitor, and by the order of the said company, for the sum of 645*l.* 7*s.*, being the balance of an account set forth in a bill of costs referred to in the affidavit of claim of the said appellant carried in before the Master, on the 16th day of April, 1850, ought to be allowed as a debt, subject (as to so much thereof as relates to business done by him prior to the complete registration of the said company) to the appellant showing to the satisfaction of the Master, that the

items of the appellant's bill of costs come within the 44th
* 1104 * article of the deed of settlement of the said company,

and subject, as to the whole of the appellant's said bill of costs, to taxation. And it is further ordered, that the matter be referred back to the Court of Chancery to do therein as shall be just and consistent with this declaration and judgment.

House of Lords' Journals for 1854, 16 March.

I N D E X.

AGREEMENT. See **MARRIAGE, PLEADING.**

APPEAL. See **BANKRUPTCY, Costs.**

ASSIGNMENT. See **COPYRIGHT.**

ASSUMPSIT. See **PLEADING.**

BANKRUPTCY.

A person adjudicated a bankrupt under the 12 & 13 Vict. c. 106, must, if he desires to annul the adjudication, proceed under the 104th section of that statute. If he omits to do so, he can then only proceed by petition of appeal before a Vice-Chancellor. On the 15th of February, 1851, A. was adjudicated a bankrupt. On the 19th, a duplicate of the adjudication was served upon him; he did not appear to show cause against the adjudication, and on the 28th the notice of it was published in the Gazette. On the 19th of March he presented a petition to the Commissioner to annul the adjudication. The Commissioner pronounced his decision on the 14th of April, and on the 23d the bankrupt presented a petition of appeal to the Vice-Chancellor: *Held* (affirming a decision of Lord Chancellor Truro), that the petition of the 19th of March was a petition of appeal against the Commissioner's adjudication, and therefore could not be presented to the Commissioner, whose jurisdiction in such matter was then at an end; that the party had no title to come before the Vice-Chancellor except on appeal against the adjudication, and that for that purpose the petition was presented too late. — *Carter v. Dimmock*, 337.

CHURCH RATES. See **ECCLESIASTICAL COURT.**

It is the duty of the parish to repair the fabric of the parish church, and the neglect or refusal to perform this duty will subject those who so neglect or refuse to punishment in the Ecclesiastical Court. — *Gosling v. Veley*, 679.

A valid church rate can only be made by an actual or constructive majority of the parishioners in vestry assembled, and if * the majority should refuse to make a rate for the purpose of discharging this duty, such refusal would not entitle the minority to make the rate. — *Id. ib.*

An irrelevant vote on a proposition submitted to a vestry meeting does not prevent those who gave it from afterwards voting on any other proposition relating to the same subject proposed at the same meeting. Therefore: A resolution passed by the majority in vestry to declare that no church rate is necessary, and to refuse any such rate, does not disentitle the per-

sons composing that majority to vote upon the question of any particular proposal for a rate made by any of the minority; and if a rate should be made by the minority alone, the votes of the other persons present not having been taken on it, such rate will be bad. — *Id. ib.*

At a vestry meeting assembled under a monition from the Ecclesiastical Court to consider of and make a rate for the repairs of the parish church, an estimate was produced by the church-wardens, and a rate of 2s. in the pound proposed by them. No objection was made to the estimate, but an amendment was passed by the majority that church rates were bad in principle, and ought to be refused, and the vestry did refuse to make a rate accordingly. The vicar, church-wardens, and certain others of the vestry, without taking any vote on the question, did afterwards produce and sign a rate of 2s. in the pound: *Held*, that the rate thus agreed to was invalid. — *Id. ib.*

In a suit to enforce such rate, the libel, after setting forth the refusal of the majority to make the rate, contained this allegation: "The church-warden proposed, addressing himself to those rate payers who were willing to obey the monition, that a rate of 2s. in the pound should be made by them, and a rate of 2s. in the pound is produced and signed by the vicar, the two church-wardens, and several rate payers present. The mover of the amendment protested," &c. *Semblé*, that this allegation showed the rate to have been made by the minority; but — *Held*, that to sustain the suit, the libel must show the rate to have been made by the majority of the vestry; for that no other rate is valid. — *Id. ib.*

CONDITION IMPLIED IN A POLICY OF INSURANCE. See **INSURANCE.**

CONDITION PRECEDENT OR SUBSEQUENT. See **CONTINGENT INTERESTS.**

1. The Earl of Bridgewater, by his will, devised very large real estates *1107 to trustees to make a settlement according to the limitations *mentioned in the will. One of these limitations was "to Lord Alford for and during the term of ninety-nine years, if he shall so long live"; remainder to trustees during his life to preserve contingent remainders; "remainder to the use of the heirs male of his body, with remainder, in default of such issue, to the use of C. H. C. for the term of ninety-nine years, if he shall so long live"; remainder to trustees to preserve contingent remainders; "remainder to the use of the heirs male of the body of C. H. C., subject, nevertheless, as to the several uses and estates so to be limited to Lord Alford and C. H. C., and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several provisos for the determination thereof hereinafter contained." The testator then declared "that in the settlement to be made pursuant to this my will, my said estates are not to be limited successively to the use of the first and other sons of Lord Alford, or of C. H. C., in tail male, but to the heirs male of their respective bodies, in the words of this my will, it being my intention that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of the said Lord Alford and C. H. C. respectively." The testator then provided, "that if Lord

Alford shall die without having acquired the title of Duke or Marquis of Bridgewater to him and the heirs male of his body, then, and in such case, the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void." There was a similar proviso as to Lord Alford acquiring such title within five years after he should succeed to be Earl Brownlow, and unless he did so, the testator directed that the estate limited, &c. (as before) "shall thenceforth cease and be absolutely void; and my real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if the said Lord Alford were actually dead without issue male." Lord Alford entered into possession of the estates, but died, without acquiring either of the titles, leaving an heir male: *Held*, that the estate thus created in favour of Lord Alford's heirs male was not affected by the proviso, which was a condition subsequent, and which was void, as being against public policy, and therefore that the eldest son of Lord Alford was entitled to the estates as heir male under the limitation. — *Egerton v. Brownlow*, 1.

2. A. became tenant to B. of a colliery and also of some farm land, at distinct rents. The lease contained very numerous covenants *as * 1108 to the payment of the rents, and as to the management of each property. The term created was for forty-two years; but the tenant was to have liberty to put an end to the term, on giving eighteen months' notice before the expiration of the first eight years, or of any subsequent three years. The proviso which gave the tenant this liberty, after describing the giving of the notice, contained these words: "Then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed), this lease, and every clause and thing therein contained, shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, cease, determine, and be utterly void. . . . But nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." The Court of Exchequer had held that this proviso did not make the performance of all the covenants a condition precedent to the power to give notice to put an end to the lease. The Court of Exchequer Chamber held that the proviso did make the performance of the covenants a condition precedent. The Lords were equally divided, and so the judgment of the Exchequer Chamber was affirmed. — *Grey v. Friar*, 565.

CONTINGENT INTERESTS. See CONDITION PRECEDENT OR SUBSEQUENT, INTERESTS, WILL.

A contingent gift or interest has a real existence, capable, as much as a vested interest or estate, of being operated upon by a condition subsequent, and being made to cease and become void. — *Egerton v. Brownlow*, 1.

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owe the Crown a temporary allegiance ; and any such foreigner, first publishing his work here, is an "author" within the meaning of the statute, no matter where his work was composed, or whether he came here solely with a view to its publication. — *Jefferys v. Boosey*, 815.

Copyright commences by publication ; if at that time the foreign author is not in this country, he is not a person whom the statute meant to protect. — *Id. ib.*

An Englishman, though resident abroad, will have copyright in a work of his own, first published in this country. — *Id. ib.*

* 1109 * B., a foreign musical composer, resident at that time in his own country, assigned to R., another foreigner, also resident there, according to the law of their country, his right in a musical composition of which he was the author, and which was then unpublished. The assignee brought the composition to this country, and, before publication, assigned it, according to the forms required by the law of this country, to an Englishman. The first publication took place in this country : *Held*, reversing the judgment of the Court of Exchequer Chamber, that the foreign assignee had not, by the law of this country, any assignable copyright here in this musical composition. — *Id. ib.*

Per LORDS BROUGHAM and ST. LEONARDS : Copyright did not exist at common law. It is the creature of statute. — *Id. ib.*

Per LORD ST. LEONARDS : No assignment of copyright under the 8 Anne, c. 19, the benefit of which is claimed by the assignee, although from a foreigner, can be good in this country, unless it is attested by two witnesses — *Id. ib.*

Per LORD ST. LEONARDS : There cannot be a partial assignment of copyright. — *Id. ib.*

COSTS. See **PRACTICE.**

1. Where there had been a previous decree, in substance the same as that which was appealed against, but made in a different suit and by a different Judge, but the appeal was dismissed with costs. — *Russell v. Dickson*, 293.
2. Where under special circumstances the House discharged an order giving leave to appeal, and in that manner vacated a judgment pronounced upon that appeal, no costs were given either to the party who had obtained the judgment which was thus vacated, or to party who had succeeded in getting it vacated. — *White v. Tommey*, 313.
3. By the Judges : Upon a judgment awarding a peremptory mandamus, the costs are not those awarded at the discretion of the Court, under § 6 of 1 Wm. 4, c. 21, but are the general costs under § 4 of that statute. — *The Queen v. The Directors of the Southeastern Railway Company*, 471.
4. Two Courts had pronounced conflicting decisions on the construction of a will. As the testator had himself created the difficulty, the costs were ordered to come out of the estate. — *East v. Twyford*, 517.
5. An order of the Vice-Chancellor was reversed, but the party who obtained the reversal having omitted to bring before his Honour a document on which that reversal was founded, it was reversed without costs. — *Terrill v. Hutton*, 1091.

* CROWN. See PEERAGE.

* 1110

DEED. See EVIDENCE.

DEED, VOLUNTARY OR FOR VALUE.

J. S. under his marriage settlement was seised of certain estates in the county of Clare, for life, remainder to his sons successively in tail, subject to a charge of 5000*l.* as a provision for younger children. B. S. was the eldest son of this marriage, W. S. another son, and there was a daughter, Diana. J. S. afterwards purchased other estates, one of which was called K., which in 1806 he conveyed by way of mortgage security to the Bishop of Elphin. In February, 1807, he executed a deed, by which, assuming to be the owner in fee of K., he conveyed it and other lands to trustees for himself for life, then to his eldest son B. S. for life, remainder to the eldest and other sons of B. S. successively in tail. This deed contained a covenant on the part of B. S. to pay J. S.'s debts, and to discharge a sum of 2000*l.* which J. S. had undertaken to pay to two children of Diana; and also an assignment by J. S. of his personal estate in favour of B. S., who was thereby appointed the attorney of J. S. with power to call in the debts due to him. The deed was registered (apparently without the knowledge of J. S. or of W. S.) upon the 1st June, 1807. On the 13th June, 1807, by a deed, to which J. S., B. S., two trustees, and W. S. were parties, J. S. granted and B. S. confirmed to the trustees the lands of K. to J. S. for life, then to W. S. for life, remainder to his first and other sons in tail, with a power to each succeeding tenant for life to charge the same with a jointure for his wife; and by the same deed W. S. gave up his share of any benefit from the provision, for younger children under his father's marriage settlement or otherwise. This deed was registered a few days afterwards. J. S. died in November, 1808, and W. S. entered into possession of the lands of K. W. S. married in 1815, and B. S. was a party to his marriage settlement, in which the lands of K. were included, and by which, under the power contained in the deed of June, 1807, W. S. created a jointure for his wife. B. S. paid his father's debts, satisfied the mortgage on the lands of K., obtained a reconveyance of them to himself, and died in 1837, having allowed W. S. to remain in undisturbed possession up to that time. W. S. continued in possession, and died in 1843. The son of B. S., claiming under the deed of February, 1807, brought ejectment against the son of W. S., who relied on the deed of June for his title. At a trial of this ejectment, the jury found that the deed of February, 1807, was a voluntary *deed, * 1111 and that that of June, 1807, was given for a valuable consideration.

The Court of Queen's Bench in Ireland directed a new trial, which took place, but the defendant did not appear, and the plaintiff obtained judgment against him by default. A bill was filed by the plaintiff in the Court of Chancery there, to have the trusts of the deed of February, 1807, carried into execution, and that Court decreed accordingly: *Held*, that the decree was right; that after what had occurred at law, it must be assumed that the deed of February, 1807, was given for a valuable consideration, and that the deed of June, 1807, was a voluntary deed; and further, that the subsequent marriage of W. S., and the circumstances

attending it, did not constitute his children purchasers for value under the latter deed, which could not prevail against an earlier and a previously registered deed that had been executed for a valuable consideration. — *Scott v. Scott*, 1065.

ECCLESIASTICAL COURT. See CHURCH RATE.

In the Ecclesiastical Court the onus of proving a rate to have been rightly made lies on those who assert its validity, and if that validity is not affirmatively established, the common-law Courts will prohibit the enforcement of the rate. — *Gosling v. Veley*, 679.

An order of the Ecclesiastical Court to admit a libel and exhibits to proof is not a definitive sentence. — *Id. ib.*

In a suit to enforce a church rate, the libel, after setting forth the refusal of the majority to make the rate, contained this allegation: “The church-warden proposed addressing himself to those rate payers who were willing to obey the monition, that a rate of 2s. in the pound should be made by them; and a rate of 2s. in the pound is produced and signed by the vicar, the two church-wardens, and several rate payers present. The mover of the amendment protested, &c.”

Semblé, that this allegation showed the rate to have been made by the minority; but — *Held*, that to sustain the suit, the libel must show the rate to have been made by the majority of the vestry, for that no other rate is valid. — *Id. ib.*

“EMPLOY AND RETAIN.” See PLEADING.

ENTRY — IN OLD BOOK. See EVIDENCE.

EQUITY. See RECEIVER.

ERROR, COURT OF. See COSTS, EXCEPTIONS, MANDAMUS, PRACTICE.

ESTATE. See CONDITION, CONTINGENT INTERESTS, WILL, 4, 5.

*1112 ***EVIDENCE.** See LEASE.

1. In an action of ejectment the question was, Whether certain lands, known as Kingston Pastures, were part of the manor of Hayling. The lands had been purchased from the Duke of Norfolk. An entry in a book found among the muniments of the Norfolk family was tendered in evidence, for the purpose of proving the affirmative of the issue. The entry, which was made by a steward of that family, spoke of an indenture which “recited a lease made by the Earl of Arundel,” and which, tracing the lands into the possession of R. H., went on to say that “R. H. demiseth unto, &c., all those pasture grounds lying in Kingston, in the parish of Portsea, parcell of the manor of Hayling”: *Held*, that this entry was a mere recital of some document which the writer had seen or heard of, and was not admissible either as an entry made by a person in the discharge of his duty, or as an entry against the interest of the person who made it, nor was it evidence of reputation to prove that the lands were parcel of the manor. — *Doe d. Padwick v. Wittcomb*, 425.

2. A memorial of a lease for lives of lands in Ireland, with a covenant for perpetual renewal, was executed there in 1746, and was registered under the provisions of the Irish Registry Acts. In 1845 the owner in fee of these lands disputed his liability to renew. On a bill filed by the assignee of the lease to compel a renewal, the memorial (the original lease being

lost) was received as secondary evidence of the covenant contained in the lease. — *Sadlier v. Biggs*, 435.

Several renewals had been granted between 1746 and 1845, and the acts of the successive tenants of the estate in granting these renewals, though not evidence to prove the existence of the covenant, were held to become, when the covenant had been proved, evidence of the construction which the parties interested had put upon it. — *Id. ib.*

EXCEPTIONS, BILL OF. See **INSURANCE**, 2.

A bill of exceptions, which sets forth what a Judge was asked to direct, and alleges that he refused to give such direction, is informal and bad. A bill of exceptions should state what directions the Judge gave, as it is misdirection, and not nondirection, which is the subject of the bill. — *Anderson v. Fitzgerald*, 484.

EXECUTORY TRUST. See **WILL**, 1, 4, 5.

FOREIGNER. See **COPYRIGHT**.

FRAUD. See **PRINCIPAL AND SURETY**.

* “**GRANDSON.**” See **WILL**, 5.

*1113

“**INHERIT.**” See **WILL**, 5.

INFANT. See **LEASE**.

A lease of lands in Ireland, containing a covenant for perpetual renewal, had been executed there in 1746. Several renewals, sometimes voluntary, sometimes compulsory, had been granted between that period and 1845, when the owner in fee disputed his liability to renew. Upon one of the occasions of renewal, the tenant for life against whom a bill had been filed was an infant. The Court of Chancery in Ireland ordered his guardian to execute a lease in conformity with the covenant contained in the deed of January, 1746: — Per **LORD ST. LEONARDS**: That order was authorised by the Irish Statute 11 Anne, c. 3. — *Sadlier v. Biggs*, 435.

INSURANCE.

1. The owners of a vessel insured ship and freight, but, in consequence of disasters at sea, totally abandoned the ship, which, however, arrived in port, and freight was actually earned and paid; but it was received by the underwriters on ship as incident to the abandonment: *Held*, that the owners could not recover against the underwriters on freight. — *Scottish Marine Insurance Company v. Turner*, 312, note.
2. By the law of England, in a time policy effected on a vessel then at sea, there is no implied condition that the ship should be seaworthy on the day when the policy is intended to attach. — *Gibson v. Small*, 353.
3. Per **LORD CAMPBELL**: There is not, in a time policy effected on a vessel then abroad, any implied condition whatever as to seaworthiness; not even as to the time when the vessel sailed on the voyage during which the policy attaches. — *Id. ib.*
4. **Quare.** Whether there is any such implied condition in a time policy effected on an outward-bound ship lying in a British port where the owner resides. — *Id. ib.*
5. A policy of insurance was effected in London on the 27th of November, 1848, on a ship then abroad, “lost or not lost, in * port and * 1114 at sea, in all trades and services whatsoever and wheresoever, dur-

ing the space of twelve calendar months, commencing on the 25th September, 1843, and ending on the 24th September, 1844, both days included." To a declaration for a total loss on the 14th October, 1843, by perils of the sea, the defendant pleaded that "ship was not, at the time of the commencement of the risk in the policy of insurance mentioned, nor at the making of the said insurance, nor on the said 25th September, 1843, in the declaration mentioned, seaworthy, or in a fit and proper condition to go to sea; but, on the contrary thereof, was wholly unseaworthy." It appeared in evidence, that on the 24th of September, 1843, the ship was at sea, seriously damaged, and in that state it succeeded in making Madras in the course of the following day. The verdict found the plea to be proved in fact: *Held* (affirming the judgment of the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Queen's Bench), that this plea did not afford a defence to the action, for that there was no implied condition that the ship should be seaworthy on the day when the policy was intended to attach. — *Id. ib.*

6. F. applied to an insurance office to effect a policy on his life. He received a form of "Proposals" containing questions requiring to be answered. Among these were the following: "Did any of the party's near relations die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" To each of these questions F. answered "No." The answers were false. F. signed the proposals, and a declaration accompanying them, by which he agreed "that the particulars mentioned in the above proposals should form the basis of the contract." The policy mentioned several things which were "warranted" by F. The subjects of these two answers were not included in such warranty. The policy also contained a proviso, that "If anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the company in or about the obtaining or effecting of this insurance," the policy should be void, and the monies paid should be forfeited: *Held*, in an action on the policy, reversing the judgments of the Courts of Exchequer and Exchequer Chamber in Ireland, that it was a misdirection on the part of the

Judge to leave it to the jury to say whether the answers to the two * 1115 questions were material as well as false; and if not material, that the plaintiff was entitled to the verdict. The representation being part of the contract, its truth, not its materiality, was in question. — *Anderson v. Fitzgerald*, 484.

INTERESTS, CONTINGENT OR VESTED.

A contingent gift or interest has a real existence, capable, as much as a vested interest or estate, of being operated upon by a condition subsequent, and being made to cease and become void. — *Egerton v. Brownlow*, 1.

IRISH REGISTRATION ACT. See DEED, EVIDENCE, INFANT, LEASE.

JUDGES, ATTENDANCE OF, ON THE HOUSE. See PRACTICE, 1.

JUDGMENT OF THIS HOUSE NOT REVERSIBLE. See PRACTICE, 8.

LEASE. See CONDITION.

S., on the 5th January, 1746, being tenant in fee simple of lands in Tipperary, executed an indenture, which was, two days afterwards, registered under the Irish Registration Acts. The memorial represented that S. had, by the indenture, demised, or agreed to demise, these lands to C. for three lives, therein named, with "a clause of renewal after the expiration of said lives thereinbefore mentioned," provided that C., his heirs, &c. should, "within six months from the death of the last of said three lives, nominate such life or lives as he would have inserted," and pay all rent, and "the sum of 11*l.* 7*s.* 6*d.* for adding or renewing such life or lives for ever." The memorial was signed by C. alone, and he registered it. In February, 1750, S. executed a settlement in contemplation of marriage, by which he made himself tenant for life only in the estate comprised in the indenture of 1746. In March, 1750, he executed a lease to C., in which the indenture of 1746 was recited, and in consequence of some changes in the lands, a change was made in the rent. The lease recited the indenture as a demise to C. for three lives and the longest liver of them, with a covenant to "renew the same for ever, on payment of 11*l.* 7*s.* 6*d.* for renewing the same on the fall of every life, within six months next after the fall of each life." The *habendum* in the lease was for the same three lives ; and S. covenanted that, "upon the death or failure of the aforesaid life or lives, or any or either of them" (naming them), and upon C., his heirs, &c. paying "the sum of 11*l.* 7*s.* 6*d.* above the annual rent, within the space of six calendar months, and immediately after the death or failure of such life," and on nomination, &c., "S. and his heirs," &c. would add the life so nominated ; "and so in like manner from time to time successively for ever thereafter on the failure of every other several life or lives in the said lease or thereafter to be nominated."

Renewals had, from time to time, been made by the * successors of * 1116 S. in the estate, sometimes after proceedings in Chancery to compel the same, sometimes without such proceedings ; but at length, in 1845, G., the descendant of S., refused to renew, and a bill was filed against him by B., who had become possessed of C.'s lease. The bill prayed for a renewal according to the lease, which B. alleged to have been made in conformity with, and under the obligation of, the indenture of 1746. This indenture could not be produced, but the memorial was tendered and received in evidence. The defendant alleged that the lease was ineffectual to bind the inheritance, as it was made by a person who was, at the moment of executing it, only tenant for life, and he contended that there was no legal evidence of the indenture of 1746. He also relied on the difference between the terms of renewal contained in the indenture and those contained in the lease : *Held*, affirming the judgment of the Court below, that the plaintiff was entitled to the renewal as prayed ; that the memorial was properly admitted as secondary evidence of the indenture ; that that indenture was to be treated as an original lease, under the obligation of the covenant contained in which the lease of 1750 was executed ; that the obligation entered into in 1746 being by the tenant in fee simple, his performance of it in 1750 was valid, although he was then only tenant

for life ; and that the acts of the successive tenants of the estate, though not evidence to prove the existence of the covenant, became, when the covenant had been proved, evidence of the construction which the parties interested had put upon it. — *Sadlier v. Biggs*, 485.

Upon one of the occasions of renewal, the tenant for life against whom a bill had been filed was an infant. The Court of Chancery in Ireland ordered his guardian to execute a lease in conformity with the covenant contained in the deed of January, 1746 : —

Per LORD ST. LEONARDS : That order was authorised by the Irish Statute 11 Anne, c. 3. — *Id. ib.*

LEGACY. See **COSTS**, **WILL**, 3.

Where a legacy is given in each of two different instruments, the testator must, *prima facie*, be understood to have meant to give two separate legacies ; but there may be circumstances to rebut that presumption. — *Russell v. Dickson*, 298.

“LIVING AT DEATH.” See **WILL**, 2.

MAJORITY AND MINORITY. See **CHURCH RATE**, **ECCLESIASTICAL COURT**.

*1117 * **MANDAMUS.**

Under the 8th & 9th Vict. c. 20, § 46, a railway company has the option, when its line of railway crosses a turnpike road or a public highway (except when otherwise provided by the special Act), either to carry the road over the railway, or the railway over the road. A mandamus to command the company to do one of these two things is therefore defective, unless it shows, on the face of it, circumstances which establish the impossibility of the company exercising this option. — *The Queen v. The Directors of the Southeastern Railway Company*, 471.

Where such a mandamus had been issued, and the return had merely traversed that the road was a public road, and the issue thus raised had been found against the company, and a peremptory mandamus had been awarded : Held, that on a writ of error, the Court of Error being satisfied that the mandamus itself ought not to have issued, had properly reversed the whole judgment. — *Id. ib.*

By the Judges : Upon a judgment awarding a peremptory mandamus, the costs are not those awarded at the discretion of the Court, under § 6 of 1 Wm. 4, c. 21, but are the general costs under § 4 of the statute. — *Id. ib.*

MANOR. See **EVIDENCE**.

MARRIAGE. See **SETTLEMENT**.

On a treaty respecting the marriage of H. M., who was believed to have considerable expectations from his uncle, H. E., the guardians of the lady desired a settlement ; and H. M. addressed a letter to H. E., who answered, “ I have made my will, and left you my property in the county of T., which is very considerable.” The guardians still refused their consent, “ until a suitable settlement shall be made by Mr. H. E. of real estate upon the marriage, in the usual course of settlement, and until the sum of 10,000*l.* shall be secured to the trustees of the estate ” of the father of the lady from whom H. M. had some time before borrowed that money,

in order to become a partner in a bank. The resolution of the trustees was communicated to H. E., who, in September, 1815, wrote: "My sentiments respecting you continue unalterable; however, I shall never settle part of my property out of my power while I exist; my will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled any thing on any of my nephews, and I should give cause for *jealousy * 1118 if I was to deviate in this instance from a resolution I have long made." This answer was, at the desire of H. E., communicated to the guardians, who, in March, 1816, consented to the proposed marriage, which accordingly took place in July of that year. A settlement was then drawn up, in which it was recited that "H. M. has reason to expect that he will, upon the decease of H. E., become entitled, by virtue of the will of H. E., to a certain portion of his estate and property, pursuant to the declaration of H. E., contained in his letter to H. M. of September, 1815." H. E. was made one of the trustees of the settlement, and, about twelve months afterwards, he executed the deed; but there was no evidence that he knew any thing of its contents beyond the fact that he was named as one of the trustees. H. E. afterwards devised his property to other persons: *Held*, affirming the decision of the Court below, that H. M. could not maintain a suit to compel the trustees under the will of H. E. to convey the Tipperary estate to him, for that H. E.'s letter did not amount to a contract to settle it on him. — *Maunsell v. White*, 1039.

MATERIALITY OF STATEMENT IN POLICY. See INSURANCE, 6.

MEMORIAL. See EVIDENCE, 2.

MISDIRECTION. See INSURANCE, 6.

MISREPRESENTATION. See PRACTICE, 9. INSURANCE, 6.

MUSICAL COMPOSITION. See COPYRIGHT.

NOTICE. See CONDITION, 2.

PEERAGE.

Quære. Whether a subject can refuse a Peerage created either by patent, or by writ. — *Egerton v. Brownlow*, 1, 37.

PLEADING. See ECCLESIASTICAL COURT, EXCEPTIONS, INSURANCE, 5.

A count in a declaration in assumpsit set forth an agreement between an attorney and solicitor and a company, that "from January then next, the plaintiff, as the attorney and solicitor of the company, should receive a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business transacted by him for the company as such attorney and solicitor; and should for such salary advise and act for the company on all occasions in all matters connected with the company" (the prosecuting and defending of suits, preparing bonds, and some other matters, for which he was to be allowed the regular charges, being excepted), "and that he should attend the secretary and the board of directors when required." * The count then alleged, "That in consideration that the * 1119 plaintiff had, at the request of the company, promised the company to perform his part of the agreement, the company promised the plaintiff

to perform their part, and to retain and employ him as such attorney and solicitor of the said company, on the terms aforesaid." The count then alleged for breach, that, "though for a small space of time the company did retain and employ the plaintiff as such attorney and solicitor on the terms aforesaid, and did pay him a small part of the salary, and though he was always ready and willing to advise and act for the company, and to accept the salary on the terms aforesaid, and in all other respects to fulfil the agreement on his part, yet the company, disregarding, &c., did not, nor would, continue to retain or employ the plaintiff as such attorney or solicitor on the terms aforesaid, but, on the contrary," in May, "wrongfully dismissed and discharged the plaintiff from such employment and retainer, and then and from thence hitherto have wholly refused to retain or employ him as such attorney and solicitor of the said company, and to pay him the salary as aforesaid, by reason of which last-mentioned premises the plaintiff has wholly lost and been deprived of the salary, and also of divers great gains and profits which he might and otherwise would have derived from such employment in and about the prosecuting and defending of suits and preparing of bonds, &c." After a verdict for the plaintiff, with 200*l.* damages: *Held*, that the count did sufficiently allege a consideration for the promise to retain and employ the plaintiff as attorney and solicitor, and that the consideration was not exhausted by the promise on the part of the company to perform the agreement.—*Emmens v. Elderton*, 624.

PRACTICE. See COSTS, MANDAMUS.

1. The Judges were summoned to answer questions of law: they differed in opinion on these questions. Most of the Judges being on circuit, two of their number attended on a day fixed by the House for receiving the answers, and proposed to read answers which embodied their own opinions and those of their brethren. The House adjourned the matter till the Judges should have returned from the circuit, so as to be able to attend in person, and individually express their reasons for their opinions. It was also stated that this permission to dispense with the attendance of any of the Judges to whom questions had been put must not be drawn into a precedent.—*Egerton v. Brownlow*, 1.

* 2. Where there had been a previous decree, in substance the same as
 *1120 that which was appealed against, but made in a different *suit, and by a different Judge, the appeal was dismissed with costs.—*Russell v. Dickson*, 293.

3. A judgment of this House given on an appeal cannot be reversed; but where such appeal and judgment have been obtained by suppression and misrepresentation, the House will afterwards discharge the order granting the leave to appeal, and the order constituting the judgment thereon.—*Ex parte White v. Tommey*, 313.

4. A decree in Chancery was made in January, 1835, and enrolled in May of that year. A petition for leave to appeal against it (the proper time for appealing having gone by) was presented in February, 1839, and refused. The party who was dissatisfied with the decree filed a bill of review in 1844. A demurrer to that bill, for want of equity, was allowed.

The order allowing the demurrer was appealed against in 1846, and in the appeal the original decree was expressly complained of. In July, 1847, there was a general dismissal of the appeal, and the order allowing the demurrer was specially mentioned in the order of dismissal; but the original decree was not mentioned. In 1848 there was a petition for leave to appeal against the original decree and certain other orders made in the course of the proceedings, but which had not then been enrolled, and in the petition, it was stated that "it appeared by the order of July, 1847, that the decree of January, 1835, had not been complained of, and therefore that their Lordships had not made any declaration with respect to it," and that "the said decree had never been adjudicated upon by their Lordships." On this petition, and after other proceedings taken, leave was given to include in the appeal the decree of January, 1835. The appeal was heard *ex parte*, and in June, 1850, the decree was reversed: *Held*, that this reversal had been obtained by suppression and misrepresentation, and the parties affected by it having petitioned for relief, the House discharged the order, giving leave to appeal against the decree of January, 1835, and the order which had reversed that decree. No costs were given. — *Id. ib.*

5. It is a matter of discretion for the Court of Chancery whether it will or will not interfere by *interim* order respecting the property of a litigant. If the property is *in medio* (in the actual enjoyment of no one), the Court will interfere for the benefit of all concerned. — *Owen v. Homan*, 997.
6. When a married woman, having separate estate, is a party to a suit, the interference will be accorded or refused according to the circumstances of the case. — *Id. ib.*
7. Where the Court summarily interferes against the legal possession, it has a right to expect a plaintiff to proceed with the *most complete and honest diligence to obtain a decree. Delay in his proceedings constitutes an objection to the proposed interference. — *Id. ib.*
8. An objection in respect of parties to an appeal must be taken before the Appeal Committee. — *Id. ib.*
9. On the hearing of a cause, in which the question for decision depended on the form of the pleadings, and the House was of opinion that the pleadings would not allow the question to be properly decided, time was given, after argument, to allow an arrangement between the parties, by which the pleadings might be altered for that purpose. — *Bristol (Marquis) v. Robinson*, 1088.
10. The House will refuse to allow a cause to stand over indefinitely, though upon an understanding that the appeal is to be compromised, but will require it to be proceeded with in its regular turn, or to be withdrawn. — *Mayor of London v. Combe*, 1089.

PRINCIPAL AND SURETY. See RECEIVER.

Though a creditor may not, in every case, be bound to inquire into the circumstances under which a third person becomes surety to him, he is so when the dealings between the parties are such as to lead to a suspicion of fraud. — *Owen v. Homan*, 997.

It is a general rule that a creditor may give time to a principal debtor with-

out prejudicing his right against the surety, provided he expressly reserves such right. Circumstances may, however, prevent that rule from having effect. — *Id. ib.*

PROHIBITION. See **CHURCH RATE, ECCLESIASTICAL COURT.**

PROVISO. See **CONDITION, INTERESTS, WILL.**

PUBLIC POLICY. See **CONDITION, INTERESTS.**

RAILWAY. See **MANDAMUS.**

Under the 8th & 9th Vict. c. 20, § 46, a railway company has the option, when its line of railway crosses a turnpike road or a public highway (except when otherwise provided by the special Act), either to carry the road over the railway, or the railway over the road. — *The Queen v. The Directors of the Southeastern Railway Company*, 471.

A mandamus to command the company to do one of these two things is therefore defective, unless it shows, on the face of it, circumstances which establish the impossibility of the company exercising this option. — *Id. ib.*

RATE. See **CHURCH RATE.**

RECEIVER. See **PRINCIPAL AND SURETY.**

* 1122 A creditor of a partnership, consisting of two persons, had * received from one of them joint and several promissory notes, accepted by himself and a third party, a married woman, having separate estate. The partnership was afterwards dissolved by deeds, by virtue of which the second partner, on giving up certain title deeds, was altogether exonerated from liability to the creditor, who, however, expressly reserved his rights on all notes and other securities which he held in his hands at the time of the execution of these deeds. These transactions were wholly unknown to the third party, who was the surety on the notes. There were various circumstances which might have awakened the suspicion of the creditor, and he had not taken any steps to inform the surety as the notes became due that she had become or continued liable upon them. In a bill for an account and a receiver, filed by the creditor, the surety put in an answer detailing these circumstances, and alleging fraud: *Held*, affirming the decree of the Lord Chancellor (who had reversed an order of the Master of the Rolls), that this was not a case in which the Court would interfere by appointing a receiver. — *Owen v. Homan*, 997.

REGISTRATION. See **EVIDENCE, INFANT, LEASE.**

REHEARING. See **PRACTICE, 3.**

RENEWAL. See **LEASE.**

“**RETAIN AND EMPLOY.**” See **PLEADING.**

SEAWORTHINESS. See **INSURANCE.**

SETTLEMENT. See **MARRIAGE.**

“**SON.**” See **WILL, 5.**

STATUTES.

8 Anne, c. 19. — Copyright, 815.

11 Anne (Ir.) c. 3. — Guardian and Infant, 436 - 463.

1 Wm. 4, c. 21. — Mandamus, 471.

9 Vict. c. 20. — Railway, 471.

12 & 13 Vict. c. 106. — Bankruptcy, 337.

14 & 15 Vict. c. 83. — Chancery, 337.

SUBSTITUTION; GIFT IN. See WILL, 3.

SUPPRESSION. See PRACTICE, 3.

SURETY. See PRINCIPAL AND SURETY.

TENANT FOR LIFE. See WILL, 4, 5.

TENANT IN TAIL. See WILL, 4, 5.

VESTRY. See CHURCH RATE, ECCLESIASTICAL COURT.

VOLUNTARY. See DEED.

VOTE. See CHURCH RATE.

* WILL. See CONTINGENT INTERESTS, LEGACY. *1123

1. The Earl of Bridgewater by his will devised very large real estates to trustees, to make a settlement according to the limitations mentioned in the will. One of these limitations was "to Lord Alford for and during the term of ninety-nine years, if he shall so long live"; remainder to trustees during his life to preserve contingent remainders; remainder to the use of the heirs male of his body, with remainder, in default of such issue, to the use of C. H. C. for the term of ninety-nine years, if he shall so long live"; remainder to trustees to preserve contingent remainders; "remainder to the use of the heirs male of the body of C. H. C., subject, nevertheless, as to the several uses and estates so to be limited to Lord Alford and C. H. C., and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several provisos for the determination thereof hereinafter contained." The testator then declared, "that in the settlement to be made pursuant to this my will, my said estates are not to be limited successively to the use of the first and other sons of Lord Alford, or of C. H. C., in tail male, but to the heirs male of their respective bodies, in the words of this my will, it being my intention that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of the said Lord Alford and C. H. C. respectively." The testator then provided that every person entitled under his will, or the settlement thereby to be made, should take and use the surname and arms of Egerton only, and should "apply for and use his utmost endeavour to obtain his Majesty's license to sanction the same," and that every person thus entitled neglecting so to do, the estate limited to such person should thereupon cease, determine, and be void. The testator likewise provided, "that if Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater, to him and the heirs male of his body, then, and in such case, the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void." There was a similar proviso as to Lord Alford acquiring such title within five years after he should succeed to be Earl Brownlow, in which case the testator directed that the estate limited, &c. (as before) "shall thenceforth cease and be absolutely void; and my real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if the said Lord Alford were actually dead without issue male." Lord Alford entered into possession of the estate, * took * 1124 the surname and arms, and obtained the royal license authorising him so to do, but he died, without acquiring either of the titles, leaving an

heir male: *Held*, that the estate thus created in favor of Lord Alford was not affected by the proviso, which was a condition subsequent, and which was void, as being against public policy, and therefore that the son of Lord Alford was entitled to the estate as heir male under the limitation. — *Egerton v. Brownlow*, 1.

2. M. D. devised certain estates to his nephew, Sir J. E., Bart., for life, and after Sir J. E.'s decease to his second son and his heirs male; and in default to the third son and his heirs male, and so on, with a proviso, that if the baronetcy should come to or descend to the second son of Sir J. E., the estates should go over to the next in succession. P. J., the father of Lady E., by a will made subsequently to that of M. D., devised his estates to his daughter, Lady E., for life, then to her eldest son for life, and his heirs, and for default, &c. to the second son of Lady E. for life, and his heirs ("in case he shall not become, or shall not continue, seised of the real estates of M. D. by virtue of his will"), and to the third and every other son of Lady E., subject to the like condition, "Provided always, that if it shall happen that my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates, hereby limited and settled as aforesaid, then, and in either of those cases, I devise all my said real estates, subject respectively as aforesaid, to all the daughters (if more than one) of the body of my said daughter, who shall be living at her death, as tenants in common, and their heirs, &c.," with cross remainders amongst them; "and if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs." At the time of the death of Lady E. there were two sons and several daughters living; both sons afterwards died without issue: *Held*, that the daughters of Lady E. did not take any estate under the limitations of the will of P. J., for that the words "living at her death" applied to both branches of the proviso, and that the contingency on which the daughters were to become entitled determined at the death of their mother. — *Eden v. Wilson*, 257.
3. A testator gave by his will, "To my natural or reputed daughter, M. S., 2000*l.*, for her own sole and separate use, the interest thereof, at five *1125 per cent., to be expended on her *education"; and intrusted the care and charge of her to his brother. In a codicil, executed five years afterwards, he said, "I add 3000*l.* to the 2000*l.* to which M. S. is entitled under my will, by which she becomes entitled to 5000*l.*" In about a year afterwards, and about ten days before his death, he made a further codicil, in which he said, "Not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds with the sum of 20,000*l.* for my daughter, M. D. "; in this instance giving her his own name, as if she was a legitimate daughter: *Held*, affirming the decree of the Court below, that there were circumstances here to rebut the *prima facie* presumption in favour of the last legacy being treated as additional, and that it was only substitution for the sums previously given. — *Russell v. Dickson*, 293.

4. Where an estate for life is given by clear words, the mere imposition of a charge on the tenant for life will not have the effect of enlarging the estate. — *East v. Twyford*, 517.
5. A testator, by a will written on the pages of a small note-book, divided his property into three classes, marked No. 1, No. 2, No. 3. He devised these classes of property to persons designated by letters. The order of "succession" was marked in one page (54) of his will. This page contained the words, "The eldest and other sons to inherit before the next letter." The persons designated by the letters were all named in a card, which was referred to in the will, and which card was with the will admitted to probate. K was the testator's wife, to whom was given an estate for life in all the classes of the property. The will required implicit obedience to certain orders of the testator on the part of "the individual first to inherit after K"; and if not, "the property aforesaid set down and particularized in No. 1 to go to M, if not to L, and afterwards to his eldest lawfully begotten son, &c." There were similar expressions with regard to N and O. The card showed that these two letters were intended for the eldest sons of two nephews, but who were then unborn. The property No. 1 consisted of very large sums in stock, which the trustees of the will were to invest in the purchase of real estate; and in page 54 L was named as the person to take No. 1 after the life estate of K. A grandson was "to inherit before the next-named in the entail or any one of his sons." Class No. 2 consisted of a small estate in land, and by page 54, O was, as to that, to succeed to K, and the estate there given to O was expressly a life estate, with remainder to his eldest and other sons in tail male; and it was there also *said "a grandson * 1126 legitimate shall inherit before a younger son." Class No. 3 consisted of certain estates in Suffolk; the "succession" there was (page 54) "first to K, then to M," and the devise (page 47) was "first to K, and then to M, and afterwards to his eldest legitimate son, and then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male; if he have, it will go to him, and so on to the other sons in like manner. After the decease of K, I repeat, I bequeath all the property aforesaid to M and his heirs male, in the manner aforesaid, as in the case of L, &c., at page 2, and I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions": Held that, taking all the parts of the will together, L only took a life estate in No. 1, with remainder to his eldest and other sons in tail male.— *Id. ib.*

Held, also, that this was not an executory trust. — *Id. ib.*

WINDING-UP ACT. See COSTS, 5.

The intention of the 11th & 12th Vict. c. 45, was to provide for debts recoverable only in equity, as well as for those recoverable at law; and the Master has a discretion (subject to appeal) to allow or disallow, or to allow as a claim only, according to the proofs adduced before him, any demand against a company. Certain persons proposed to form a company; they employed A. as their solicitor before the formation of the company, and until it was wound up; the directors were not to be personally liable to

the officers of the company. The 44th article of the deed of settlement declared, that "a sufficient part of the funds of the company should, upon complete registration, be appropriated in payment of the expenses of and incidental to the formation of the company, including those of or having reference to the preparation and execution of that deed." When the company was before the Master on the Winding-up Act, the solicitor presented a demand for services from the earliest period up to that time. The Master allowed the demand as a claim only, and not as a debt, leaving the solicitor to proceed at law: *Held*, reversing an order of Vice-Chancellor Kindersley, that the Master ought to have allowed this demand as a debt, but subject to proof that the items came under the description contained in the 44th article, and subject also to taxation. — *Terrell v. Hutton*, 1091.

END OF VOL. IV.

